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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 78

MARSHALL L. MOTT, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 11, 1930

CERTIORARI GRANTED MAY 19, 1930

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(34,941)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, tenth circuit	a	1
Caption (omitted in printing)	d	
Record from district court of the United States, Northern Oklahoma	1	1
Caption (omitted in printing)	1	
Amended bill of complaint	1	1
Exhibit A—Letter from Barnett to Fall, December 15, 1922	22	24
Exhibit B—Letter from Ward to Commissioner of Indian Affairs, December 16, 1922	25	27
Exhibit C—Letter from Barnett to Fall, January 30, 1923	33	36
Motion to dismiss	34	38
Supplemental motion to dismiss	36	40
Order on motion to dismiss	43	47
Application for leave to file second amended bill of complaint	44	48
Notice of filing application	45	49

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1930

	Original	Print
Second amended bill of complaint	46	50
Objections of defendant to granting leave to file second amended bill of complaint	53	58
Opinion, Pollock, J., on application to file second amended bill of complaint	55	60
Order denying motion to file second amended bill of complaint	57	63
Petition for appeal and order allowing same	59	64
Assignment of errors	60	66
Citation and service (omitted in printing)	62	
Præcipe for transcript of record	63	68
Clerk's certificate (omitted in printing)	66	
Appearances of counsel (" " ")	67	
Argument and submission (" " ")	67	
Opinion, Lewis, J.	68	71
Decree	72	76
Mandate	73	76
Præcipe for transcript	74	77
Clerk's certificate (omitted in printing)	75	
Order allowing certiorari	76	78

[fols. a–d] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT
NORTHERN OKLAHOMA

Equity No. 343

UNITED STATES OF AMERICA, Plaintiff,

vs.

MARSHALL L. MOTT, Defendant

AMENDED BILL OF COMPLAINT—Filed Sept. 13, 1928

Comes now the United States of America, hereinafter designated the plaintiff, by, through and under authority of the Attorney General of the United States; and by John M. Goldesberry, United States Attorney for the Northern District of Oklahoma; Charles B. Selby, Special Assistant to the Attorney General, thereto specially assigned, and Ernest E. Danly, Attorney for the United States, and, with leave of court first had and obtained herein, files this, its amended bill of complaint, and for its cause of suit and [fol. 2] for grounds of relief against the defendant, Marshall L. Mott, alleges and complains as follows:

I

That some time prior to April, 1912, the Congress of the United States, by statutory enactments had created and conferred on the County Courts of the State of Oklahoma, the courts therein exercising exclusive probate jurisdiction, complete and exclusive jurisdiction as probate courts in matters of guardianship of the persons and estate of minor and incompetent Indians and freedmen, members of the Five Civilized Tribes of Oklahoma, of which said Creek Tribe is one, subject, however, to the express reserved authority of Congress to further legislate with reference thereto and subject also to the express authority conferred upon the Secretary of the Interior, with respect to the

restricted lands and the proceeds therefrom arising, belonging to the members of said Tribe of Indians, to remove such restrictions, such removal of restrictions to be under such rules and regulations concerning the terms of sale and disposal of the proceeds thereof for the use and benefit of the respective Indians as he, the Secretary, might prescribe, and subject also to the further exclusive authority of the said Secretary of the Interior to permit and give validity, by his approval, to oil and gas leases, on such allotted restricted lands, such approval of oil and gas leases also to be made by the said Secretary of the Interior under rules and regulations provided and promulgated by him, and not otherwise; that the authority so conferred on the Secretary of the Interior, and subject to which the authority of said County Courts of Oklahoma, as probate courts, was limited, is set forth and shown in sections 1 and 2 of the Act of Congress of May 27, 1908 (35 St. at L., 312), and so far as applicable reads as follows:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

"Sec. 1. * * * All homesteads of said allottees enrolled as mixed-blood Indians having more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred [fol. 3] and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. * * *

"Sec. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of

renewal; provided, that leases if restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior and not otherwise; and provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions . . .

That, at the time of the enactment of all applicable Acts of Congress, as well as at all times herein complained of, there existed and were in full force and effect, as forming the applicable statutory laws if the State of Oklahoma, the following provisions, appearing in the Compiled Statutes of Oklahoma, 1921, designated and reading as follows:

"1449. Petitions for guardians of incompetent or insane persons. When it is represented to the County Court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing."

"1450. Guardian appointed when. If after a full hearing and examination upon such petition, it appears to the judge of the County Court that the person in question is incapable of taking care of himself and managing his property he must appoint a guardian of his person and estate, with the powers and duties in this article (chapter) specified."

[fol. 4] "1451. Bonds and powers of guardian. Every guardian appointed as provided in the preceding section, has the care and custody of the person of his ward and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions, as prescribed with respect to the guardian of a minor."

II

That one Jackson Barnett is a full-blood member and citizen of the Creek Tribe of Indians, duly enrolled as such opposite Roll No. 4264, and is a citizen and resident of the United States, with his legal domicile at all times herein mentioned within the County of Okmulgee, State of Oklahoma. That as such citizen and member of the said Creek Tribe of Indians, and under authority of the laws of the United States, there was duly allotted to the said Jackson Barnett, as his distributive share of the lands of the Creek Tribe of Indians, one hundred and sixty (160) acres of land, described as the southeast quarter of section 5, township 17, north of range 7, east, located in Creek County, State of Oklahoma.

III

That said Jackson Barnett is approximately of the age of seventy-six (76) years, and at all times herein mentioned was, and now is, a mental incompetent, illiterate, unable to read and write, and wholly incapable of understanding, or comprehending the value, condition, character, nature or extent of his property, and wholly incapable of managing, conserving, protecting, preserving or caring for the same, and wholly incapable of discerning and understanding the motives and designs of persons with whom he came in contact, as well as wholly incapable of comprehending the import or nature of business transactions, and instruments of writing, of the most simple character, and particularly was wholly incapable of understanding and comprehending the purported trusts, instruments, agreements, negotiations, transactions, matters and things hereinafter particularly mentioned, and of which the United States hereinafter complains.

IV

The United States, further complaining, avers that by order of the County Court of Okmulgee County, Oklahoma, on the twenty-ninth day of April, 1912, the said Jackson Barnett was adjudged to be mentally incompetent, and incapable of conducting and managing his affairs and prop-

erty and caring for his person, and did thereupon appoint [fol. 5] one Carl J. O'Hornett, as guardian of the person and estate of said Jackson Barnett, under which appointment Carl J. O'Hornett qualified, and assumed the duties of such guardian, and in which capacity he continued to act until about the thirteenth day of June, 1923, at which time he resigned; that during all of said time the said Carl J. O'Hornett was recognized, treated, and considered by all departments of the Government as the duly constituted guardian of the person and estate of the said Jackson Barnett, and at all of said times the said Jackson Barnett was treated and considered as a mental incompetent, and in all respects incapable of managing his affairs and of caring for his person, and at all of said times the County Court of Okmulgee County, Oklahoma, was recognized as a federal agency, authorized to act as such in the matter of the guardianship of said Jackson Barnett, and that the said Carl J. O'Hornett, under orders of said County Court as such agency, was authorized to receive from the Department of the Interior such amounts as the officials of said Departments deemed proper to release to him, to be by him as such guardian disbursed for the use and benefit of the said Jackson Barnett; that said appointment was subsequently determined by the Supreme Court of Oklahoma in December, 1926, to be invalid.

V

The United States, further complaining, avers that soon after the appointment of the said Carl J. O'Hornett as guardian, and pursuant to an order of said County Court in said guardianship proceeding, the said Carl J. O'Hornett, under his name and designation as guardian of the said Jackson Barnett, executed as lessor an oil and gas lease in form prescribed by the Secretary of the Interior covering the said restricted allotment of land of the said Jackson Barnett, which said lease ran in the name of H. U. Bartlett, as lessee, and was for a period of ten years thereafter and as long as oil and gas should be produced thereon, which said lease was approved by the then Secretary of the Interior on the 13th day of September, 1912; that, among other provisions, said lease expressly provided that

payments of the reserved oil and gas rentals and royalties thereunder should be made to the United States Indian Superintendent at Muskogee, Oklahoma, for the use and benefit of said Jackson Barnett, under which terms the lessee did thereafter, from time to time, pay into said office, as the depository, the accruing oil and gas rentals and royalties under said lease, until about August 1, 1914, when said office was abolished by Act of Congress, and thereafter, for some eight years, paid into the office of the [fol. 6] Superintendent for the Five Civilized Tribes at Muskogee, the succeeding depository created by Act of Congress, until the same had accumulated therein in an amount in excess of One Million One Hundred Thousand Dollars ($1,100,000.00) and which amount, from time to time, by direction of said Secretary of the Interior, was converted into United States registered bonds, as herein more specifically mentioned.

VI

The United States, further complaining, avers that, as a result of explorations and developments on said land, and of the transformation of the said Jackson Barnett from poverty to a state of great wealth, great publicity was given to the fact that said Jackson Barnett was aged, illiterate, mentally incompetent, under guardianship, unmarried, and possessed of great wealth; that during the latter part of the year, 1919, one Anna Laura Lowe, hereinafter designated Anna Laura Barnett, a woman of then about thirty-five years of age, who did not know the said Jackson Barnett, having learned of his great wealth, situation and condition, as aforesaid, did immediately conceive and formulate a plan and scheme to surreptitiously abduct or kidnap him from his home, located in an isolated section of said county, if need be by force, and take him, without ability on his part to understand her purpose, carry him away and procure a pretended marriage, and thereby, and in such manner and by such means as might thereafter be found expedient or necessary, to defraud him out of a large part of or all his wealth and estate, and also defraud the United States by interfering with and by obstructing it in the discharge of its duty to protect him, and to pro-

tect, safeguard and conserve his said property, as a ward of the Nation; as well as to defeat the authority and jurisdiction of the said County Court of Okmulgee County over his person and estate, as well as the authority of said guardian thereover, by removing him, the said Jackson Barnett, out of the jurisdiction of the County Court and of the state, and to thus and thereby ultimately obtain, acquire, and procure unlawfully, all of the said bonds and other funds and estate and property of the said Jackson Barnett; that in furtherance of her said wrongful and unlawful scheme, she, Anna Laura Barnett, in an attempt to carry out the same, did, on or about the last day of January, 1920, make futile attempts to procure a marriage license in Oklahoma, under which to marry the said Jackson Barnett, and did cause herself to be driven, in the night-time, to the said home of Jackson Barnett, where she, well knowing his said mental incompetency and want of understanding, forcibly placed him in her automobile, [fol. 7] and therein detained him and transported him to two different county seats in the State of Oklahoma, in her efforts so to procure a marriage license, which license was refused; and thereafter, and on or about the twenty-second day of February, 1920, in furtherance of her said wrongful, unlawful and fraudulent plan and scheme, she again, in the night-time, in an automobile, drove to the said home of said Jackson Barnett, where, again by force, and without an understanding or appreciation on his part as to her said purpose, placed him in said automobile, and by force detained him, and carried him out of the State of Oklahoma into the State of Kansas, and to the Town of Coffeyville therein, a distance of some one hundred and fifty miles, where, having procured a pretended marriage license purpoting to authorize a marriage between herself and the said Jackson Barnett, she procured a pretended marriage ceremony to be performed by a justice of the peace of said Town of Coffeyville, pretending to unite herself and the said Jackson Barnett in wedlock; that immediately following she, the said Anna Laura Barnett, by force detained the said Jackson Barnett in a room in said Town of Coffeyville, and refused to permit him to be seen by the said Carl J. O'Hornett or others interested in his welfare.

VII

That thereupon the said Anna Laura Barnett, in furtherance of her said fraudulent scheme, brought to the attention and made known to Harold C. McGugin and Walter S. Keith, then composing the firm of Keith and McGugin, engaged in the practice of law at Coffeyville, Kansas, her said purpose and plan to so obtain the said bonds, funds and property of the said Jackson Barnett, through the said pretended marriage, then making known to the said Harold C. McGugin and Walter S. Keith all the facts and circumstances concerning the taking of the said Jackson Barnett to said Town of Coffeyville, and further advised them that she anticipated interference with the accomplishment of her said plan by the guardian of said Jackson Barnett and by officials of the government, whereupon she, the said Anna Laura Barnett, and the said Harold C. McGugin and Walter S. Keith, conspired together and entered into an agreement whereby and whereunder they, the said Anna Laura Barnett, Harold C. McGugin and Walter S. Keith, should and would, take all steps, and do all things deemed by them, or any of them, necessary or expedient in the accomplishment of her said scheme to obtain the entire property and estate of Jackson Barnett, and to secure and make provision for the acquisition of his estate upon his death. That thereupon the said Anna Laura Barnett, then [fol. 8] being advised that the said pretended marriage of the said Anna Laura Barnett to the said Jackson Barnett, pretended to be consummated in said Town of Coffeyville, Kansas, was prohibited by a statute of the State of Kansas prohibiting the marriage of a person of unsound mind, and making such marriage a nullity, did, in furtherance of said fraudulent plan, confederation and conspiracy, immediately transport and take the said Jackson Barnett into the State of Missouri, where the said Anna Laura Barnett and the said Harold C. McGugin, procured a second pretended marriage license and again caused a pretended marriage ceremony to be performed pretending to unite the said Anna Laura Barnett under the name of Anna Laura Lowe to the said Jackson Barnett, the said Jackson Barnett at no time having mental capacity to understand or to give consent to being taken into the State of Kansas and into the State of

Missouri, and of procuring the said marriage license, and of entering into the said pretended marriage. That immediately thereafter, and in furtherance of and in aid of the said fraudulent scheme, confederacy, and conspiracy, the said Anna Laura Barnett and said Harold C. McGugin and Walter S. Keith, entered into contracts in writing, by the terms of which the contracting parties agreed upon a division of such sums as they might be able to procure from the said Jackson Barnett while living, and from his estate after his death, and thereunder and in furtherance of said fraudulent scheme, Confederacy and conspiracy, and for the purpose of aiding in the accomplishment thereof, did thereupon, and from time to time thereafter, draw written wills purporting to make and name the said Anna Laura Barnett as the principal or sole beneficiary thereunder of the estate of said Jackson Barnett, and caused the said Jackson Barnett, in his said mentally incompetent condition, to place his thumb print thereto, he, the said Jackson Barnett, having at no time any ability to ratify the making of said pretended wills, or testamentary instruments.

VIII

That about the year 1922, the said Anna Laura Barnett and Harold C. McGugin and Walter S. Keith, having previously, in furtherance of their said fraudulent scheme and plan, made repeated demands upon said guardian and County Court aforesaid for the release to them of large amounts of the restricted funds of said Jacksn Barnett, then having knowledge that one A. J. Ward, was then, and for a long time had been, under employment by and as Tribal Attorney of the said Creek Tribe of Indians, and that by reason of his employment was, by the Indians, favorably regarded, and also regarded favorably by the offi- [fol. 9] cers of the Department of the Interior having to do with Indian Affairs and who then, and at all times herein complained of, well knew and understood the said general plan and scheme of the said Anna Laura Barnett and Harold C. McGugin and Walter S. Keith, as well as being advised of all the acts of the said Anna Laura Barnett and Harold C. McGugin and Walter S. Keith in relation thereto

and in connection therewith and as herein alleged, did then, at the request and solicitation of the said Anna Laura Barnett and Harold C. McGugin and Walter S. Keith, agree and promise to co-operate with them, and to aid and assist them in the accomplishment of said plan and scheme to the end of taking such steps and doing such acts as thereafter might be deemed expedient and necessary in procuring the release of the restricted bonds and funds of the said Jackson Barnett, as aforesaid, from the custody and control of the Secretary of the Interior, and to procure the delivery of said funds and bonds by the said Secretary of the Interior, or so much thereof as might be procured, to the said Anna Laura Barnett; that soon thereafter and in furtherance of said agreement, plan and scheme, the said A. J. Ward went to the City of Washington, D. C., where he was met by Harold C. McGugin, where both thereof met the defendant, Marshall L. Mott, a friend and former partner of the said A. J. Ward, and a former Tribal Attorney of said Tribe of Indians, and who was known by the said A. J. Ward and Harold C. McGugin and Walter S. Keith to be familiar with the manner and practice of handling matters affecting the Indians and their property before the Department of the Interior; that the said A. J. Ward and Harold C. McGugin then made known the said plan and scheme as aforesaid to said Marshall L. Mott, procured his assurance that he would counsel, advise and assist in the accomplishment of said scheme, and the said Harold C. McGugin, with the knowledge and approval of the said A. J. Ward, and in the name of and as agent for, the said Anna Laura Barnett, agreed to give him, the said Marshall L. Mott, $15,000 of said bonds, and if, received by and delivered to her, the said Anna Laura Barnett, under which said agreement the said Marshall L. Mott did thereafter, from time to time counsel, advise and assist the said A. J. Ward, Anna Laura Barnett and Harold C. McGugin and Walter S. Keith in respect to the consummation of said plan and scheme, as is hereinafter more particularly mentioned.

IX

That thereafter it was agreed between the said Anna Laura Barnett, A. J. Ward, defendant Marshall L. Mott and

[fol. 10] Harold C. McGugin and Walter S. Keith that in order to effectuate the said plan and scheme, all said parties then well knowing that there was in excess of $1,100,000 of the restricted bonds and funds of the said Jackson Barnett then held by and under the control of Albert B. Fall, Secretary of the Interior, that an instrument should be drawn purporting to be the act of the said Jackson Barnett, and therein advise the Interior Department that the said Jackson Barnett desired to make a distribution of the said bonds by gift thereof to the American Baptist Home Mission Society for the benefit of certain Indian Schools in the amount of $550,000 and to the said Anna Laura Barnett in the amount of $550,000 and that the same should purport and appear to be the request of said Jackson Barnett to the Secretary of the Interior to remove the restrictions from said bonds and funds, and to grant the said application, and to make a distribution of said funds and bonds in accordance therewith, and that said instrument should set forth and contain such other recitals therein, purporting to be the reasons and grounds conceived and proposed by the said Jackson Barnett as the basis for the making of said donations, all to create the impression and as would make it appear that the same and all thereof was the rational and independent act, intent, wish and desire of the said Jackson Barnett, all of which said pretended reasons and grounds so to be therein incorporated are fully set forth and shown in the said instrument hereinafter more particularly referred to and set forth and shown by copy thereof hereto attached, marked "Exhibit A," and made a part hereof, and same were therein incorporated for the purpose and intent of inducing the said Albert B. Fall, Secretary of the Interior, to rely thereon, believe the same and to accordingly thereupon grant said pretended request and to authorize and make the distribution of the said bonds and funds accordingly; and it was also agreed between said named persons participating therein that a written statement in the nature of a pretended confirmation of said pretended instrument of gift should be formulated and presented to said Secretary of the Interior, the said two instruments to bear the thumb print impression as a signature of the said Jackson Barnett, and both thereof to be witnessed by the said A. J. Ward over his designation as

Tribal Attorney for said Tribe of Indians. That it was also agreed between the said participating parties that a written recommendation should be drawn and signed by the said A. J. Ward over his designation as Tribal Attorney, which said recommendation so to be made by the said A. J. Ward should contain statements and representations with reference to said pretended thumb print instrument of gift of the said Jackson Barnett, as well as statements relating to [fol. 11] the said Jackson Barnett and his estate, as would likely influence and induce the said Albert B. Fall, Secretary of the Interior, to believe the statements made in the said pretended thumb print application and to rely thereon, and to accordingly release said funds and bonds and make the distribution thereof accordingly, the particular representations and statements so to be incorporated in said recommendation of the said A. J. Ward being particularly shown by copy thereof hereto attached, marked "Exhibit B," and made a part hereof, and as more particularly hereinafter referred to.

That thereupon and in furtherance of said agreements, understandings, plan and scheme and under the advice and counsel of the said participating parties, the said A. J. Ward prepared said pretended instrument of request and gift so referred to, and the said recommendation so to be by him presented for said purposes aforesaid and thereupon procured the said Jackson Barnett to affix to said pretended instrument of gift his thumb print mark impression, and did witness the same, upon which thereafter, the said Anna Laura Barnett, in keeping with said understanding, did thereupon endorse her approval of said pretended instrument of gift and her acceptance of the terms thereof. The United States, further complaining avers that thereafter and in furtherance of said agreements, plan and scheme, and to-wit, on or about the 29th day of January, 1923, the said named participating parties to the preparation of the said two instruments, and with the same purpose and intent as aforesaid, did procure the drawing of an instrument by the said A. J. Ward addressed to Albert B. Fall, Secretary, as aforesaid, purporting therein to represent that the said Jackson Barnett approved the purported instrument of gift and the purported request therein made, together with the statements therein contained, all as is

shown by copy marked "Exhibit C," hereto attached and made a part of this complaint, to which said instrument the said named participating parties procured the thumb print impression of the said Jackson Barnett to be affixed.

X

The United States, further complaining, avers that at no time did the said Jackson Barnett have the slightest understanding that said instrument were being prepared, or had been prepared, nor had he any understanding or capacity to understand the import, contents, nature or purpose thereof, all of which was at all times well known by each and every of the said named participating parties therein.

XI

[fol. 12] The United States, further complaining, avers that the said named participating parties, as a part of the said plan and scheme, agreed that the facts with reference to consummating the same should be withheld from the said guardian and County Court as aforesaid, and that the acts with reference thereto should be carried on secretly, without publicity, if possible, without information reaching said guardian and County Court, avers that upon the completion of said instruments as aforesaid, the said A. J. Ward, with the knowledge and approval of each of the said named parties participating in the preparation thereof, caused the said instruments to be thereupon transmitted to the said Albert B. Fall, Secretary of the Interior aforesaid, with the intent and for the purpose all as hereinbefore alleged.

XII

The United States, further complaining, avers that the said instruments so referred to were false, fictitious, and fraudulent, and so known at all times to be by each of the said named parties so participating in the preparation and presentation thereof, and in the preparation thereof, and in the respects particularly stated hereinafter, to-wit:

(1) That the said pretended thumb print request and gift was in fact not the act and deed of the said Jackson

Barnett; were not statements and expressions at any time formulated, conceived or made by the said Jackson Barnett, but in truth and in fact were statements, expressions, declarations and suggestions conceived wholly and alone by the said named parties so participating in the preparation and presentation of said instruments wholly independent of the said Jackson Barnett.

(2) That the statements therein to the effect that Jackson Barnett had no living relatives or kindred were false in fact, and so known by the said parties so participating in the drawing thereof to be, on this, that the said Jackson Barnett then had a living half-brother, David Barnett, duly enrolled, as well as other living blood relatives, members of said Tribe.

(3) That the further statement in said instrument to the effect that it was desired that said pretended gift be made to the said Anna Laura Barnett because she had shown every consideration to the said Jackson Barnett, was false, when in truth and in fact, as alleged in this bill, she, the said Anna Laura Barnett, had kidnapped him, and, aided by the said Harold C. McGugin and Walter S. Keith, [fol. 13] constantly endeavored to withdraw and remove the said Jackson Barnett from the control of said guardian and County Court; had manipulated him into affixing his thumb print to numerous wills in which she, the said Anna Laura Barnett, was named as chief beneficiary; that she had entered into contracts with the said Harold C. McGugin and Walter S. Keith whereunder they were to receive large portions of the property of said Jackson Barnett while living, and of his estate when dead, that should come into the possession of the said Anna Laura Barnett as a result of her said plan and scheme in return for the assistance thereby given to her in aid thereof by the said Harold C. McGugin and Walter S. Keith; that she then had entered into an agreement to deliver to the said Harold C. McGugin and Walter S. Keith $150,000 of said bonds, and to said defendant Marshall L. Mott $15,000 thereof when received by her.

(4) That the further representation therein to the effect that she, the said Anna Laura Barnett, had brought Jackson Barnett from poverty and degredation was false and

untrue in this, that at the time of said pretended marriage there had been accumulated as the property of said Jackson Barnett, as a result of said oil lease upon his said tract of land, largely through the management of the said guardian and County Court, in excess of $1,100,000, and that during all of said time said guardian had expended to or for the use and benefit of Jackson Barnett in excess of $650 a month in the maintenance of a home and for servants, medical attention and other requirements, and in addition a Paige automobile in excess of $2,600.

XIII

And the United States avers that the representations set forth and contained in the written recommendation of the said A. J. Ward, recommending to the Department of the Interior the granting of said pretended request of the said Jackson Barnett to make the distribution of said bonds and funds were false and untrue, and at all times well known and understood by each of said named participating parties therein to be false and untrue in this, that the said Jackson Barnett had not submitted to the said A. J. Ward, as in the said recommendations represented, the said thumb print instrument or bequest by the said Jackson Barnett; that the said Jackson Barnett had not, as in said recommendation stated, undertaken to make the gifts, or any gifts, of his property or estate of any character, but that [fol. 14] in truth and in fact, the said false, fictitious, and fraudulent instrument in its entirety had been prepared by the said A. J. Ward, with the assistance, advice, counsel and suggestions of the said Anna Laura Barnett, Marshall L. Mott, Harold C. McGugin and Walter S. Keith, and each and every of the provisions, statements, matters and things set forth and mentioned in said purported thumb print instrument were wholly conceived, formulated and stated therein for the purpose and with the intent to make the same appear as the independent act of the said Jackson Barnett, said defendant Marshall L. Mott, and his associates in said conspiracy knowing that the said Jackson Barnett did not, and could not, conceive and formulate the same.

That the further representations set forth in said recommendation of the said A. J. Ward to the effect that the said

Jackson Barnett had signed the thumb print instrument, designated by said A. J. Ward in his said recommendation as a communication was entirely false, for in truth and in fact the thumb print impression of said Jackson Barnett thereon was made thereon by the act of the said A. J. Ward, by his manipulation of the hand of the said Jackson Barnett, after taking the said Jackson Barnett into a private room while the said Anna Laura Barnett and said Harold C. McGugin waited at the door in an adjoining room, the said Jackson Barnett being incapable of understanding in the slightest degree the purpose and object of his being so manipulated, and without the slightest ability to understand that the instrument to which his thumb print impression was caused to be attached had relation whatsoever to a distribution of his funds.

That the further representation in said recommendation of the said A. J. Ward to the effect that the said Jackson Barnett had undertaken to make a gift of Five Hundred and Fifty Thousand Dollars ($550,000) to the American Baptist Home Mission Society was false and untrue in this, that in truth and in fact the said Jackson Barnett had not conceived, and was incapable of conceiving, a purpose and intent to make any gift or donation to said Society; that he had no knoweldge of the existence of said Society; and was incapable of understanding anything concerning the fact of its existence, and had no understanding as to the nature of the Bacone College and Murray Orphans Indian School, mentioned in said instrument, and had never manifested, and was incapable of manifesting any concern in the said named institutions, and had at no time formed a desire or expressed a wish or intent to make any gifts of his property for the benefit thereof, and was at all times incapable of so doing.

[fol. 15] That the further representation in said recommendation of the said A. J. Ward that said Jackson Barnett had requested the officials of the Department of the Interior to attend to the details of said transaction or involving said pretended gifts was false and untrue in this, that in truth and in fact Jackson Barnett had not so requested, and was incapable of so requesting, and did not in fact have the slightest understanding that the disposition of his property was in contemplation by the parties

so participating in said plan and scheme, as herein alleged.

That the inference by innuendo in said recommendation of the said A. J. Ward that the said Jackson Barnett had negotiated the arrangements leading up to the preparation of said purported thumb print bequest and instrument of gift was false and untrue, in this, that in truth and in fact said plan and purpose, and all negotiations with reference thereto, were made and carried on without consideration of the said Jackson Barnett, and without notice to the guardian thereof, and to the County Court in which said guardianship proceedings were pending, and all of said negotiations were the independent acts of the said named participating parties in said matter, with the purpose and intent thereof to thereby accomplish the said fraudulent scheme and conspiracy, as in this bill alleged.

That the further representation in said recommendation of said A. J. Ward to the effect that Jackson Barnett was a typical full-blood Indian, possessed of all the inclinations and characteristics which are usual in the Indian, was false and untrue, and was known by said participating parties so to be, in this, that in truth and in fact the majority of the full-blood Indian members of said Tribe were possessed of a fair education, could read and write, engage in ordinary business transactions, and in large measure, as the result of association with white people, had adopted their customs and habits, whereas in truth and in fact said Jackson Barnett was so wholly different in the respects in this complaint noted and alleged, as to place him in a class by himself.

That the statement in said recommendation of the said A. J. Ward to the effect that notwithstanding the income of said Jackson Barnett was sufficient to support him in luxury, that the amount he had received from his guardian was very small, and that he lived in exactly the same style as before he acquired his great wealth, and that the guardian made no effort to improve his living conditions, were false and untrue, and so known by the said participat- [fol.16] ing parties therein to be false and untrue in this, that during the period of some twelve years and to the date of making and presentation of said recommendation by the said A. J. Ward, the said guardian had expended money

in amounts in excess of $650 per month to and for the benefit of said Jackson Barnett, in the way of supplies, servants' hire, medical attention, home and otherwise, all as in this complaint alleged.

That the further representation in said recommendation of the said A. J. Ward to the effect that said guardian ignored repeated requests of Jackson Barnett for a suitable home in some locality of his choosing was false and untrue in this, that the said Jackson Barnett at no time, in any manner, requested or indicated a desire to live elsewhere than in his home in Okmulgee County, and had at all times, so far as he was able in his mental condition, indicated his desire to live in the same place among his old friends and in the midst of the scenes in which he had so long lived in Okmulgee County, and that the only demands or requests for a home elsewhere were made by the said Anna Laura Barnett and the said Harold C. McGugin.

That the representations in the said recommendation of the said A. J. Ward to the effect that said Anna Laura Barnett, as wife of the said Jackson Barnett, had done all that any woman could reasonably be expected to do to advance his interests, were false and were known by said participating parties at the time to be false, in this, that said Anna Laura Barnett, since the time of her said pretended marriage to the said Jackson Barnett, aided and assisted by the said Harold C. McGugin and Walter S. Keith, and later by said A. J. Ward, as in this bill alleged, had continually and persistently kept him from the custody and protection of the said guardian and County Court and from his old-time friends and surroundings, and had by repeated efforts sought to obtain large amounts of money from the guardian of said Jackson Barnett and had entered into contracts with attorneys whereby, in aid of her said plan and scheme, she was to distribute and pay large sums thereto, all as in this complaint alleged.

That the further representation in said recommendation of the said A. J. Ward to the effect that said Anna Laura Barnett since said pretended marriage had diligently and studiously avoided the appearance of evil and had conducted herself in a manner wholly commendable as a wife, was false and untrue, and known by said participating parties so to be, in this, that in truth and in fact throughout

said period of time, she, the said Anna Laura Barnett, in conjunction with the said Harold C. McGugin and Walter [fol. 17] S. Keith, had constantly and diligently not only made efforts to acquire the *the* release of large amounts of the funds and money of said Jackson Barnett, as previously alleged, but had also from time to time manipulated the said Jackson Barnett into placing his thumb-print signature to wills naming herself as chief beneficiary, and to contracts and instruments whereunder accounts received by her from the funds of Jackson Barnett while living, and from his estate after his death, should be appropriated and distributed to and among those for whose benefit the respective instruments were made.

That the representations in said report of the said A. J. Ward to the effect that prior to and up to the said pretended marriage the guardian of said Jackson Barnett took no interest whatsoever in his personal welfare and would dole out small amounts to him from time to time as he would to a child, were false and untrue, all as heretofore in this bill alleged.

That the further representation in said recommendation of said A. J. Ward to the effect that a change came upon the said Jackson Barnett as a result of his said marriage such as to make him a much happier man, is false and untrue in this, that in truth and in fact, so far as he was able in his condition of mental incompetence to indicate and express his feelings, he had constantly and repeatedly indicated a desire to be relieved from said restraint of the said Anna Laura Barnett and to return to his old home, friends and scenes.

That the representation in said recommendation of the said A. J. Ward to the effect that a contest or fight had been made to annul the pretended marriage of the said Anna Laura Lowe to the said Jackson Barnett, and that large amounts of money of Jackson Barnett had been expended therefor, was false and untrue, and so known by said participating parties so to be, in this, that no proceedings had been instituted and no steps taken to annul said pretended marriage.

That the further representation in said recommendation of the said A. J. Ward to the effect that the said guardianship over the person and estate of Jackson Barnett in

Oklahoma was an effort to afford opportunity for the extraction of court costs, attorneys' fees and guardian's fees under the pretext of management of his estate were false and untrue, and so known by said participating parties to be, in this, that the same had been instituted pursuant to the said Acts of Congress and laws made applicable thereby for the purpose of creating a valid oil lease upon said tract of land, and for the purpose of complying with the [fol. 18] applicable laws and safeguarding and protecting the trust property of the said Jackson Barnett, for his use and benefit.

That the further representation in said recommendation of the said A. J. Ward to the effect that those connected with the said guardianship proceedings had wrongful designs upon his property, were false and untrue, and so known by said participating parties so to be, in that, in truth and in fact said persons so connected with said guardianship proceedings had for years safeguarded and preserved the property of the said Jackson Barnett so far as the same was under their control, and the said County Court and guardian desired that same should be conserved, protected and administered for the use and benefit of the said Jackson Barnett in the manner as required by law.

XIV

The United States avers that all of said representations in said recommendation of the said A. J. Ward so contained were so falsely, intentionally and knowingly made by the said named persons so participating in the preparation thereof to create the impression in the mind of the said Secretary of the Interior and other officers of the said Department before whom the said instruments should come for consideration that the said statements, representations and matters so therein set forth were in all respects true; that the same were the independent and rational acts of the said Jackson Barnett; that the same were in fact his expressions, statements and declarations, and to induce the said Secretary of the Interior to believe the same, rely thereon and to make delivery and distribution of the said bonds in accordance therewith.

XV

The United States, further complaining, avers that the said A. J. Ward, in keeping with the plan and scheme and in furtherance thereof, did cause the said false, fictitious and fraudulent purported written requests of the said Jackson Barnett, together with the said false and fraudulent written recommendation of said A. J. Ward, together with the said false and fictitious written purported confirmation and approval of the said Jackson Barnett, to be transmitted and delivered to the said Albert B. Fall, Secretary of the Interior, on or about the 30th day of January, 1923, for his official action thereon. That thereupon, and about the 3d day of February, 1923, the said instruments being then before and in the hands of the said Albert B. Falls, Secretary of the Interior aforesaid, for official action; that the [fol. 19] said Albert B. Fall, as such officer and as Secretary of the Interior, did consider the same and all thereof, and did then approve the said pretended thumb print request of the said Jackson Barnett, and did then order and direct that said bonds in the amount of $1,100,000 be accordingly distributed and delivered by delivering $550,000 thereof to the said A. J. Ward for delivery to the said American Baptist Home Mission Society, and the remaining $550,000 delivered to the said Anna Laura Barnett, and said bonds were so then delivered and distributed, the said Anna Laura Barnett being then delivered the following of said bonds, to-wit:

U. S. First Liberty Loan Bonds #220	$50,000.00
U. S. Second Liberty Loan Bonds #6708 to 6711 inclusive, $10,000.00 each	40,000.00
U. S. Second Liberty Loan Bonds #683	50,000.00
U. S. Third Liberty Loan Bonds #1256	5,000.00
U. S. Third Liberty Loan Bonds #17824 to 17832 inclusive, $5,000.00 each	45,000.00
U. S. Third Liberty Loan Bonds #16288 to 16236, inclusive, $10,000.00 each	90,000.00
U. S. Third Liberty Loan Bonds #102	50,000.00
U. S. Fourth Liberty Loan Bonds #1572 and 1573, $100,000.00 each	200,000.00
U. S. Fourth Liberty Loan Bonds #8721 and 8722, $10,000.00 each	20,000.00

The United States further avers that the acts of the said Anna Laura Barnett, A. J. Ward, Harold C. McGugin, Walter S. Keith and the defendant, Marshall L. Mott, in carrying out their plan and scheme as herein alleged were intended to and did operate to obstruct, interfere with, and defeat the government in the exercise and discharge of its governmental functions in connection with the protection and preservation of the funds and property of the said Jackson Barnett, and the United States and the said Jackson Barnett were thereby defrauded; that in carrying out said scheme and conspiracy large sums of money were from time to time wrongfully and unlawfully obtained by said persons so engaged in said conspiracy, as herein alleged, from the funds and property of the said Jackson Barnett in amounts to the complainant unknown; that immediately upon the receipt of said registered bonds by the said Anna Laura Barnett, she, in accordance with said intent, plan and purpose of the said parties to said conspiracy and fraudulent agreement, as aforesaid, delivered to said Harold C. McGugin and Walter S. Keith part of said bonds in [fol. 20] the amount, and of the par value of $150,000, who thereupon immediately and in compliance with the terms of the agreements and understandings of the said parties and the said Marshall L. Mott, as aforesaid, and with full knowledge on his part as to the said manner of acquiring the same, delivered to the said Marshall L. Mott of said bonds the amount of, and of the par value thereof, of not less than $15,000, and the United States avers that is is informed and believes, and therefore alleges the fact to be that the said Anna Laura Barnett out of said bonds so received by her, and out of other moneys and funds by her received under said fraudulent scheme and plan, and belonging to said Jackson Barnett, paid and distributed other large amounts thereof to said Marshall L. Mott, the amount thereof being to the United States unknown.

XVII

The United States avers that by reason of the premises the said bonds and funds of the said Jackson Barnett so received by and passing into the hands of said defendant, Marshall L. Mott, all as herein alleged, as well as any property into which the same or any part thereof was converted

by said defendant, were and are, the property of said Jackson Barnett, and title thereto is held by said defendant in trust for the use and benefit of Jackson Barnett, subject to the federal restrictions thereon imposed, as in this bill averred.

Wherefore, the United States prays that the defendant, Marshall L. Mott, be required to fully answer this complaint, and to fully disclose the particular bonds herein referred to, or the converted form thereof, coming into his hands, and to fully disclose the description thereof by numbers, issue and amount, and, if any part thereof has been disposed of or converted by the said defendant, to disclose to whom, and for what consideration, and by whom received, and to disclose fully whether the same remains in the said converted form or whether same was converted, and of so, into what, and the character, nature and description of the property so received therefor, and by whom now held, and how and where located, and to fully account for all thereof, as well as any other funds received directly or indirectly from the said Anna Laura Barnett, or Jackson Barnett, on account of any of the matters and transactions in this bill complained of, that, upon an acccounting being had herein, the court decree that as to any property now held and owned by said defendant, acquired with the proceeds of any of the bonds or funds coming from the said Anna Laura Barnett, or Jackson Barnett, that the court decree the same to be held by said defendant in trust for [fol. 21] the use and benefit of the said Jackson Barnett subject to the restrictions thereon imposed by law, and if the same be found to be personal property that the same be ordered by this court delivered into the hands of the clerk of this court to be delivered to the Secretary of the Interior, to be held for the use and benefit of said Jackson Barnett as in manner by law provided, and if found to be invested in real estate that the title thereto be decreed to be conveyed by the defendant so holding the same, to the said Jackson Barnett, under such conditions as to the restrictions against alienation thereof as is provided by law.

That if, upon an accounting it be found that any amount of the said bonds and funds so alleged to have been received by the defendant cannot be traced into other property and identified, then that the United States have per-

sonal judgment against the defendant, Marshall L. Mott, in favor of the United States for the use and benefit of the said Jackson Barnett for the highest value thereof since the time of so receiving said bonds, and interest thereon.

That the United States in behalf, and for the use and benefit of Jackson Barnett, be decreed to have all other, further and proper relief in equity to which it may, under the facts and the law, be entitled, and for the costs of this cause.

United States of America, Plaintiff, by Jno. M. Goldesberry, United States Attorney, Northern District of Oklahoma, by Charles B. Selby, Special Assistant to the Attorney General of United States, by Ernest E. Danly, Attorney.

Duly sworn to by Ernest E. Danly. Jurat omitted in printing.

[fol. 22] EXHIBIT A TO AMENDED BILL OF COMPLAINT

Washington, D. C., December 15, 1922.

Hon. Albert B. Fall, Secretary of the Interior (through the Commissioner of Indian Affairs).

SIR: The undersigned, Jackson Barnett, a full-blood Creek Indian citizen enrolled opposite No. 4524 for reasons hereinafter stated, hereby makes the following gifts out of that part of his estate consisting of U. S. Liberty bonds and cash now in the custody and control of the Secretary of the Interior and restricted property under the law, such gifts to be effective immediately and absolutely and to be subject to the approval of the Secretary of the Interior as hereinafter provided and subject to such other terms and conditions as are herein imposed:

1. In consideration of love and affection and in appreciation of the faithful performance of her duties to me as my lawful wife, I give to Anna Laura Barnett, the sum of $550,000, said sum to be her property absolutely and unconditionally.

2. Having been deprived of the benefits of an education in my youth and early manhood and by reason thereof

being fully aware of the disadvantages which accrue to me not equipped with an education and especially to the Indian, it is my desire to promote education among my people to the end that the younger generation may not be handicapped by a lack of education, I give to the American Baptist Home Mission Society, a corporation of 23 East 26th Street, New York City, U. S. Liberty bonds in the sum of $550,000, said bonds or the proceeds thereof, if converted into other securities or investments to be held and retained by said society as a permanent endowment fund for the use and benefit of Indian University, generally known as Bacone College, an Indian school located at [fol. 23] Bacone, near Muskogee, Oklahoma, and the Marrow Indian Orphan's Home at Bacone, Oklahoma, the income from such endowment to be utilized and distributed between said school, and said orphans' home in such proportions as the Board of Directors or other supervising body of said society may deem proper and for the best interests of said institutions.

In consideration of said gift said society shall be required to pay to the Superintendent for the Five Civilized Tribes at Muskogee, Oklahoma, for my use and benefit the sum of $20,000 annually, payable in quarterly installments so long as I shall live. In the event of the removal of restrictions by operation of law or otherwise, prior to my death, such annual income shall then and thereafter be paid to me personally during my lifetime. To insure the payment of said $20,000 annually as above provided, said society shall be required to furnish suitable guarantee by bond or other legal and binding obligation, to be approved by the Secretary of the Interior.

For your information and for the information of those who may feel inclined to interest themselves in my affairs, I here state that I have no living relatives or kindred who either by ties of blood or by their conduct toward me, are entitled to any part of my estate or to any consideration from me whatsoever. During the greater part of my life and until I become wealthy through the development of oil on my allotment which came late in life, no living relative at any time manifested any interest in me or in my welfare whatsoever and such aid and assistance as I received in

early life came from those who were not bound to me by ties of blood or otherwise. Since my wealth has become so great and has attracted so much attention, certain persons who until that time were to all intents and purposes, strangers to me, have from time to time asserted a relationship with me and have attempted to establish themselves with me on a frindly basis.

Indeed, I have been reliably informed that some of these persons claiming relationship have already made contracts on a 50% basis with attorneys for the purpose of establishing a right in my estate upon my death. Whatever legal rights these persons may have when I die, I wish to state now that they have no moral claim upon me nor upon my estate and I here and now repudiate them one and all and denounce them as being prompted only by an avaricious desire to participate in my estate upon my death.

I have given to my beloved wife, Anna Laura Barnett, a substantial part of my estate. I am doing this for two rea- [fol. 24] sons: First, because since by marriage to her she has conducted herself toward me in a manner which is wholly commendable and above reproach. She has shown to me every consideration and through her, I have learned in a measure, to enjoy the wealth which is mine. From an environment of degradation in which I lived prior to my marriage with her, she has taken me against the most powerful and persistent opposition and has placed me in a comfortable home with pleasant surroundings and living conditions somewhat in keeping with my wealth. For all of this I am deeply appreciative and I feel that in making this gift to her, I am but doing that which every consideration of justice and equity require me to do.

Furthermore, I have reason to believe that upon my death those persons who now claim to be related to me and who will doubtless claim a part of my estate, are now planning to attack the right of my wife to any part of my property. In view of her conduct as my wife and the faithful performance of her duties as such, I feel that I should do no less than to protect her against the inconvenience and uncertainty of such a situation by endowing her with a suitable sum sufficient to her needs, so that whatever may occur after I am gone, she will be amply provided for.

To the end that these gifts may be consummated, I respectfully request the approval of the Secretary of the Interior

thereto and further request that all details in connection therewith be supervised and attended to by the proper officers of the Interior Department to the end that both the gifts and my future income and the welfare of my wife may be adequately protected and my wishes in regard thereto be carried out in full.

Respectfully submitted.

(His right thumb mark.) Jackson Barnett.

Witnesses: A. J. Ward, Creek National Attorney.

I, the undersigned, Anna Laura Barnett, the lawful wife of Jackson Barnett, hereby consents and agrees to the gifts made by Jackson Barnett as herein set forth. In this connection, I wish to state that as no part of any consideration for the gifts herein made to me, but to further assure a safe maintenance for my beloved husband, Jackson Barnett, my [fol. 25] daughter, Maxine Sturgess, and myself, I am placing in an irrevocable trust, $200,000, by the terms of which an annual income of approximately $8,000.00 is provided, which insures our support if the unfortunate event should come to pass that all other sources of income should fail. The principal sum of $200,000 cannot be diminished during the lifetime of Jackson Barnett. I am submitting to you said trust agreement, and as an act of courtesy and kindness to me, I respectfully request that you and the proper officers of the Interior Department pass upon such trust as to its legality.

Dated at Washington, D. C., this 15th day of December, 1922.

(Sgd.) Anna Laura Barnett.

EXHIBIT B TO AMENDED BILL OF COMPLAINT

Office of National Attorney for Creek Nation, Muskogee, Oklahoma

December 16, 1922.

The Commissioner of Indian Affairs.

SIR: There has been submitted to me for consideration, a communication signed by Jackson Barnett, a Creek In-

dian citizen, which is enclosed herewith, wherein Jackson Barnett undertakes to make certain gifts of that part of his estate which is in the form of Liberty Bonds and cash in substantially the following manner:

1. To his wife, Anna Laura Barnett, $550,000 without condition. On her part, however, his wife voluntarily agrees to set aside in a trust fund the sum of $200,000 the income from which shall be paid to Jackson Barnett during his lifetime to the extent of $7,500, such arrangement to be approved by the Secretary of the Interior.

2. To the American Baptist Home Mission Society of New York, Liberty Bonds in the sum of $550,000, to be held by said society as an endowment fund, the income from which is to be used for Bacone College and Murrow Indian Orphans' Home at Muskogee, Oklahoma. In consideration of this gift said society is to pay to Jackson Barnett during his life time through the Department as long as he is a restricted Indian and to him afterward, $20,000 annually, suitable guarantees to be furnished by said society.

[fol. 26] The approval of the Secretary of the Interior to these gifts is requested by Jackson Barnett and he also requests that the proper officers of the Interior Department attend to the details of the transaction to the end that the Indian be protected and the gift consummated in accordance with the terms of the donation.

The case of Jackson Barnett is so well known in the Interior Department that it may seem somewhat gratuitous to attempt any statement of its history. However, the proposed disposition of the major portion of this vast estate is so far out of the ordinary as to call for some explanation of it and in attempting this it may be found necessary to reiterate certain details with which the officials of the Department are already familiar.

Jackson Barnett is enrolled as a full-blood Creek Indian and at the date of his enrollment in 1902 as shown by the approved rolls, he was 48 years old which would make him now 68 years old. From such information as I have been able to get concerning his early life, he became an orphan when very young and lived with different families from time to time until he arrived at maturity. He is a typical

full-blood Indian and is possessed of all the inclinations and characteristics which are usually present in that class of people. When allotments of tribal land were made, he with numerous other full-blood Indians, opposed the distribution of tribal property and refused to select an allotment for himself. Under the powers granted by the treaty he was arbitrarily allotted 160 acres of land, which at that time was of little value. So little interest did Jackson Barnett take in this land that until a year or so ago, he never saw it. In 1913 oil was discovered in the vicinity of this land and there was developed what has since been known as the Cushing pool, perhaps the largest pool of oil which has been discovered in America.

About this time Jackson Barnett who had been living practically alone in the woods near Henryetta, Oklahoma, was brought into the probate court of Okmulgee County and by that court declared incompetent and a guardian was appointed over his person and estate. Almost immediately thereafter, an oil and gas lease was executed by the guardian under orders of court and approved by the Secretary of the Interior. Under this lease development began and the production of oil soon created a fund in the hands of the Department of enormous proportions. For a considerable time it was the practice of the Department to pay over to the guardian a substantial part of the income as it was received and the guardian in turn made such investments as were approved by the court. At a later date this [fol. 27] practice was stopped and during the late war the fund was used in the purchase of Liberty Bonds to the extent of over $1,000,000, which bonds are now in possession of the Secretary of the Interior.

In the meantime, notwithstanding the fact that Jackson Barnett's income was sufficient to support him in luxury, the income which he actually received from the guardian was very small and he lived in exactly the same style that he lived before he acquired great wealth. The guardian apparently made no attempt to change his living conditions and in fact, took the position that having been accustomed to a simple way of living, there was no occasion to change the situation because of a large income. This condition continued until about three years ago when the present wife of Jackson Barnett, against the wishes of the guardian

and apparently in pursuance of a preconceived plan and doubtless for mercenary purposes only, took him out of the State of Oklahoma into Kansas where they were married.

The attitude of the Interior Department toward this marriage as a matter of record and of history. Every effort was made to separate Barnett and his wife, and some $50,000 or $60,000 of his money was spent for that purpose, all under the supervision and with the sanction of the Interior Department. In keeping with this attitude the allowance to him and his wife was kept down to $500 per month and repeated requests of both Jackson and his wife for the purchase of a suitable home in some locality of their choosing were ignored, both by the Department and the guardian.

Since the marriage of Jackson and his wife, her conduct has been above reproach and she has done all that any woman could reasonably be expected to do to advance his interests and comfort. The records of your office show that prior to her marriage her reputation was exceedingly bad, and there can be no doubt of the fact that she was an adventuress of a most dangerous type. It may be said also, with certainty, that if Jackson Barnett had not been wealthy she would not have married him, or otherwise interested in him. Regardless of these facts, however, as the lawful wife of Jackson Barnett, she has apparently put herself on an entirely different plane and has diligently and studiously avoided any appearance of evil and has conducted herself in a manner so wholly commendable as to lead to the hope that she may have a sincere purpose to reform. In any event, for three years she has made good as his wife and there is no legal or moral ground on which the recognition of this fact could be denied.

[fol. 28] At the time of the marriage and prior thereto, Jackson Barnett lived in a very ordinary small house in the woods, seven or eight miles from Henryetta, where he received no attention and enjoyed none of the comforts of life. He was ragged, unkept, ill-fed and slovenly in his habits and appearance. So far as I have been able to discover, the guardian took no interest whatever in the personal welfare of this Indian, doling out to him small sums of money from time to time, such as he would a child and apparently treating his needs as of no consequence. Since his marriage he has improved in his personal habits and

appearance, wears good clothes, lives in a comfortable home, is learning to enjoy the things of life which his money will buy and is so much improved in every way that it is not difficult to overlook any short-comings of his wife when one contemplates that the change has been brought about through her efforts. In spite of all predictions to the contrary, the change has made Jackson Barnett a much happier man and I firmly believe it has prolonged his life.

The cost of administering the estate of Jackson Barnett through the probate court has been considerably in excess of what it should have been under normal conditions. The fight which was made to annul the marriage cost the estate a considerable sum in attorneys' fees and since that time the guardian has presented to me a petition and order approved by the County Court, authorizing a payment to him and his attorney, jointly, as fees $6,000 per annum, payable monthly. This payment, however, has not been made out of any funds in the hands of the Department. At the date of the last annual report, there was something over $4,000 in the hands of the guardian and nothing has been paid to him since that time, except for a time monthly allowances and special cash payments, which were immediately turned over to Jackson Barnett.

The condition of guardianship matters in the Five Civilized Tribes as they relate to the Indians is well known to the Department. An Indian may be able to care for himself during the greater part of a long life, but immediately upon the acquisition of wealth in any considerable quantity, he becomes incompetent and is hauled into court and a guardian appointed over his person and estate. From that time forward the court costs, attorneys' fees, guardian's fees and other expenses incidental to the management of his estate becomes a magnet which attracts a certain element which is unfortunately always present in Oklahoma and ready to receive such emoluments, lawful or otherwise, as may be extorted from these large estates.

[fo. 29] I make no charge that there has been any misconduct or mismanagement on the part of the guardian of Jackson Barnett nor that there has been any unprofessional conduct on the part of his attorney, but I do say that in view of the fact that practically this entire estate is restricted property under the control of the Department which cannot

be touched except with the approval and sanction of the Department, there appears to be no necessity nor occasion for the intervention of a guardian and that so far as I have been able to observe in this case, such intervention has resulted only in added expenses to the estate.

With reference to the allowance for fees for the guardian and his attorney, I have been told personally by the attorney on more than one occasion that if the Department does not see fit to allow such reasonable fees as said attorney claims to be earned, an open account will be kept of such fees and charges made thereon, and upon the death of Jackson Barnett when his property becomes unrestricted and no longer under the control of the Department, a claim will be filed with the administrator of the estate for such fees, which presumably considering past experiences of this kind will be allowed by the County Court. We thus have a situation where it seems probable that unless some disposition is made of this estate before Jackson Barnett dies or at least the major portion of it, it will be subject to encroachments and dissipation by the methods indicated and in the end the benefits which any Indian will receive from it will indeed, be small.

Furthermore, I have had inquiries from various persons who seek information as to who may be the heirs of this Indian when he dies. I have been told by one resident of Oklahoma that he has contracts on a 50% basis from two or three Indians who will claim to be heirs of Jackson Barnett upon his death and who will present this claim through the agent thus employed. I have no doubt, there are others who have similar contracts.

I am also convinced that the persons who will claim to be heirs, and possibly the guardian or administrator upon the death of Barnett will poin forces to defeat the claim of his wife to any part of his estate. I am frank to say that I do not feel much concerned about her interest to this estate but I do feel some concern about having this estate tied up in litigation for years with the ultimate possibility of its being dissipated among a lot of people who are interesting themselves in the matter only for what they may realize out of it and have no moral or legal claim on the estate.

[fol. 30] The Indians of the Five Civilized Tribes have been unfortunate in that so large a proportion of their

estates have been the object of such practices with the result that the Indians receive no benefits and are the victims of the unscrupulous. If the Department can do anything to avoid a situation of this kind I feel that a long stride will have been taken toward defeating a reprehensible practice.

The school and orphans' home to which a large part of this fund will go as an endowment, is an institution which is devoted entirely to Indians, and is the only institution of its kind within reach of Indians in Oklahoma, which by reason of its equipment, location and supervision in any degree, meets the requirements of the Indians. Its affairs are administered by the American Baptist Home Mission Society of New York, an institution which has a record of 90 years behind it which has now in endowment funds something over $10,000,000 which has a business organization which insures the proper administration of any funds intrusted to it and which is in a position to make suitable guaranties both of the administration of the fund and of the income it is proposed shall be paid to Jackson Barnett during his lifetime.

The school, while administered by a Baptist institution, makes no denominational requirements of its students; the only qualification which they must have being that they must be Indians. The orphanage is practically a part of the school and is managed by the same society and entrance requirements are as liberal as are those of the school. There are now somewhere in the neighborhood of 100 Indians in this place who are also receiving their education at the college, the buildings and grounds all being in one inclosure. The school has a schedule of fees which are required to be paid by those Indians who are able to pay, but there are many non-paying students and orphans and so far as the capacity of the school and orphange will permit, children are taken in regardless of their ability to pay.

Since 1917, the school has been under the immediate supervision of Dr. B. D. Weeks, who is especially qualified for this work and is enthusiastically devoted to it. He has done more to advance the interests of the school and orphanage than any of his predecessors and under his man-

agement it is rapidly becoming an institution of real merit and one which can be favorably considered in a matter of this kind with the utmost assurance.

To carry out the terms of the gift and to insure to Jackson Barnett the income of $20,000 per year for life, the [fol. 31] American Baptist Home Mission Society will execute a declaration of trust in the form herewith submitted and in addition thereto will enter into a contract with the Equitable Trust Company of New York whereby said funds will be held in trust by said company and the income paid to Jackson Barnett or to the superintendent for the Five Civilized Tribes while Jackson Barnett is a restricted Indian, the form of such agreement being enclosed herewith. This agreement not only insures the payment of this income as indicated but provides further that any attempted assignment of the income shall be void and shall not delay or suspend any payment thereof and that regardless of any appointment of any guardian of either the person or the estate of Jackson Barnett, said income shall be paid to him or to the superintendent as the case may be.

I am enclosing herewith a printed copy of the charter and by-laws of the American Baptist Home Mission Society together with a list of the officers, members of the board and committees: also a financial statement of said institution for the years 1921 and 1922.

The Equitable Trust Company of New York is an institution of nation-wide repute and its standing is such that there can be no question of the fufillment of any contract it enters into.

Mrs. Barnett on her own motion has consented in writing, to the gifts which are proposed to be made and as a further surety to Jackson Barnett she has voluntarily agreed to set aside the sum of $200,000 in trust, the income of which shall be paid to Jackson Barnett during his lifetime, with certain provisions for a division of said income between Jackson and her daughter, Maxine Sturgess, in the event of Mrs. Barnett's death prior to the death of Jackson Barnett. There are certain other details in connection with this trust that are of interest to Mrs. Barnett and her daughter which need not be elaborated on here, but so far as said trust estate effects the interest of Jackson Barnett,

he will be amply protected with an income more than sufficient for his needs as long as he lives. The terms of said trust are shown by copy of form enclosed herewith.

The income from the society and the trust fund, last mentioned, will give to Jackson Barnett as long as he lives independent of any other consideration the total of approximately $30,000 per year. In addition to this his allotment is now producing oil and during the past three months the income from this production has averaged more than $1,500 per month. Upon the distribution of the gifts there will [fol. 32] still be a cash balance to his credit in the Department of $40,000 or more. In addition to this property and income mentioned, there is in the neighborhood of $50,000 in farm loans which will be paid into the Department eventually and which now produce an annual revenue of $4,000 or $5,000 per year.

From the foregoing it will be seen that the distribution of that part of his estate which is necessary to consummate these gifts when made, will with the conditions attached, still leave Jackson Barnett with an annual income not greatly less than that which he is now receiving, so that for all practical purposes, the making of these gifts will not in any manner impoverish him but will serve the purpose of so placing his estate that it will be beyond the reach of those who would make encroachments upon it after he dies.

The making of these gifts in accordance with the plan herein outlined should be approved, as I view the matter and from any standpoint can be thoroughly justified. The disposition of estates during the lifetime of the owner under ordinary circumstances is not an unusual thing nor is there anything about such a course as should call for any unfavorable comment, if gifts are reasonable, just and for a worthy purpose and in keeping with the circumstances and conditions of the estate and of the individual making them. I see no reason why an Indian should not be permitted by the Department to do what, under similar circumstances, would be thoroughly approved if done by a white man. The proposed gifts viewed from any angle inevitably commend themselves as being fair, sensible and business like. If they are permitted to be made the donation to the Indian school will be of lasting and permanent benefit.

to the Indian people. Indeed, no better purpose could be served than the creation of a perpetual fund for the education of the Indians. If this gift is permitted, it will bear the distinctive mark of the first large Indian estate in Oklahoma to be conserved for a worthy purpose for the benefit of the Indians as against a long and dubious record of Indian estates dissipated, squandered and diverted from any beneficial use whatsoever, except to those unscrupulous persons who make it their business to prey upon the helpless and improvident Indian and who unfortunately have in the past, met with a large measure of success. In my opinion, this administration can build no greater or more lasting monument to itself than to approve this gift and thus announce to the world that it is in hearty sympathy with any worthy purpose which has for its object the uplifting of the Indian from his present unfortunate state. It is with sincere hope that the Department may concur in this [fol. 33] view that I recommend the approval of these gifts and the necessary authority to consummate them.

Respectfully submitted.

A. J. Ward.

Respectfully submitted.

A. J. Ward.

January 29, 1923.

I hereby concur in the above recommendation made by A. J. Ward, Creek Tribal Attorney, that the above mentioned donations be approved and that appropriate steps be taken to carry same into effect.

Respectfully, Victor M. Locke, Jr., Superintendent for the Five Civilized Tribes.

EXHIBIT C TO AMENDED BILL OF COMPLAINT

Washington, D. C., January 30, 1923.

Hon. Albert B. Fall, Secretary of the Interior.

SIR: Referring to my letter addressed to you under date of December 15, 1922, whereby, subject to your approval,

I give $550,000 to the American Baptist Home Mission Society, of New York, as an endowment fund, income from which is to be used for the benefit of Bacone College and Murrow Orphans' Home, located at Bacone, Oklahoma, and an additional sum of $550,000 to my wife, Anna Laura Barnett, said gifts to be made and the details concerning the same to be attended to by the proper officers of your Department, I have been advised by Mr. A. J. Ward, Creek National Attorney, of the plan which has been agreed upon whereby the gift to the Society above named and the payment to me of an income not exceeding $20,000 per year as long as I shall live, has been secured by an agreement between said Society and the Equitable Trust Company of New York, under the terms of which certain charges are to be made for the services of said Trust Company and for attorneys' fees and certain contingencies, and the same has been fully explained to me.

I have also been advised concerning the proposed declaration of trust to be executed by said Society, which, in [fol. 34] conjunction with the agreement between the Society and the Equitable Trust Company, constitutes a contract fixing the terms and conditions of the gifts, the disposition of the income therefrom, the charges which may be made against the same, and other matters incidental thereto.

This is to advise you that notwithstanding the apparent discrepancies between the plan which has been adopted by you as outlined above and the terms of the gifts as set forth in my letter of December 15, 1922, I regard the plan which has been adopt-d, and which it is proposed to carry out, as a substantial compliance with my wishes in the matter, and hereby consent to and approve the same in all particulars.

Respectfully, Jackson his X mark Barnett. His right thumb mark.

Witnesses: A. J. Ward, Creek National Attorney.

[File endorsement omitted.]

In United States District Court

Motion to Dismiss—Filed Sept. 29, 1928

Comes now the defendant, Marshall L. Mott, and moves this court to dismiss the amended bill of complaint herein filed by the Assistant Attorney General of the United States and the United States District Attorney for the Northern District of Oklahoma, for the reasons and upon the grounds, as follows, to-wit:

1. That said amended bill of complaint does not set forth in due form allegations showing a cause of action on the part of the United States of America against the defendant, either at law or in equity.

2. That said amended bill does not state allegations which entitle the United States to the relief prayed for therein.

3. That said amended bill aforesaid, violates paragraph 2 of Rule 25, of the Rules of Equity, in that it does not [fol. 35] allege, in short and plain statement, the facts upon which the jurisdiction of this court depends.

4. That said amended bill, aforesaid, violates paragraph 3 of Equity Rule 25, in that the same does not, in short and simple language, allege the ultimate facts upon which the plaintiff asks relief.

5. That said amended bill, aforesaid, in violation of Paragraph 3 of Equity Rule 25, alleges and states what purports to be the evidence upon which said bill is based.

6. That said amended bill, aforesaid, fails to allege and show authority of law for the Attorney General of the United States, his assistants, and the United States District Attorney for the Northern District of Oklahoma, to bring said bill into this court.

7. That said amended bill, aforesaid, violates the established and fundamental rules of pleading, in that the original bill was and is so fatally defective as not to support a decree thereon, and the amendment thereof cannot be allowed.

8. That said amended bill, aforesaid, violates the established and fundamental rules of pleading, in that the same attempts to change the form and nature of the action attempted to be pleaded and set forth in the original bill.

9. That the amended bill, aforesaid, attempts to plead a cause of action on behalf of the United States of America, for the review and cancellation of a judgment and official act of a former Secretary of Interior, done in the exercise of his official discretion, authority to do which was vested in him by Congress, and attempts to charge that said former Secretary of the Interior was fraudulently deceived by certain persons conspiring together, including the defendant herein; that neither the said former Secretary of Interior nor the present Secretary of Interior, as exhibited by said bills, has made a representation to the Attorney General of the United States, or to any of his Assistants, that said officer, aforesaid, was so deceived, nor has any request been made by said former Secretary of Interior, nor by the present Secretary, asking and requesting the Attorney General of the United States to institute said suit, in the absence of which request the said Attorney General is without authority to bring this suit.

10. That, as exhibited by the original bill herein filed, and the exhibits thereto attached, and all of the matters set up therein, said suit was brought and is now being prosecuted by the Attorney General of the United States, through his assistants, contrary to the wishes, and over [fol. 36] the protest of the present Secretary of the Interior, in which circumstances the United States District Attorney for the Northern District of Oklahoma, Mr. John M. Goldesberry, and the Special Assistants to the Attorney General of the United States whose names appear upon said original and amended bills, have no authority in law to prosecute this action in the name of, and on behalf of, the United States.

M. L. Mott, Defendant, by Chas. B. Rogers, His Attorney, Tulsa, Oklahoma.

[File endorsement omitted.]

In United States District Court

Supplemental Motion to Dismiss—Filed Oct. 10, 1928

Comes now the defendant, Marshall L. Mott, and as an additional and supplemental ground therefor, and without waiving any of the grounds set forth in his previous motion to dismiss the same, now moves the court to dismiss the amended bill of complaint herein filed by the Assistant Attorneys General of the United States and the United States District Attorney for the Northern District of Oklahoma, for that:

Heretofore and in the year 1926, the Attorney General of the United States, acting by and through the United States District Attorney for the Southern District of New York, and his Assistant Attorneys General, B. M. Parmenter and Special Assistants, Nat M. Lacy and Chas. B. Selby, filed a petition in intervention in a certain action then pending in said court entitled "Jackson Barnett, Incompetent, by Elmer S. Bailey, Prochein ami, Plaintiff, vs. Equitable Trust Company, and The American Baptist Home Mission Society, Defendants E 31—91," in which petition of intervention the said officials of the Department of Justice set forth in detail allegations of fact upon which said officials of the Department of Justice prayed relief of cancellation and avoidance of the Trust agreement, referred to in the amended bill herein, as having been executed by the said parties and the avoidance of the gift to [fol. 37] the American Baptist Home Mission Society, referred to in the amended bill herein as having been made by Jackson Barnett, with the approval of the Secretary of Interior and Commissioner of Indian Affairs; the same being with reference to and an attack upon the same official act which is now referred to and assailed in said amended bill, in which petition in intervention it was charged, after a recital in elaborate detail of every fact referred to in the amended bill herein, preceding the act of approval by the Secretary of Interior (referring to the action of said Department officials in the consideration and approval of the request of Jackson Barnett to make said gift to said Anna Laura Barnett and to the American Baptist Home Mission Society, as referred to in the amended bill herein) that:

"All thereof being done by the said named parties and Departmental officers with full knowledge of all the facts, matters and things hereinbefore alleged."

That, theretofore, and to-wit: in the year 1926, the said officials in the Department of Justice above named and the United States District Attorney for the District of Columbia, filed and caused to be filed in the Supreme Court of the District of Columbia, in an action therein pending entitled "Jackson Barnett, Incompetent, by Elmer S. Bailey, Prochein ami, Plaintiff, vs. Riggs National Bank, a Corporation, Anna Laura Barnett, and Maxine Sturgis, Defendants. No. —," a petition for leave to file an intervention therein, in which application for leave to file said intervention there was charged substantially each and every allegation set forth in the intervention filed in the New York case, and in which application it was made to appear, over the signature of said officials, aforesaid, after reciting all of the matters and things alleged, as preceeding the act of the Secretary in reference to the approval of the request of Jackson Barnett to make a gift to Anna Laura Barnett and the American Baptist Home Mission Society, detailed and set forth in the amended bill herein, and in referring to the approval by said officers of said request and the transfer of the funds and bonds referred to—that said action of said officers was:

"* * * all thereof being done by the said named parties and Department officers with full knowledge of all the facts, matters and things hereinbefore alleged."

That similar allegations were made by said officers of the Department of Justice having charge thereof in the [fol. 38] suit in the United States District Court for the Southern District of California entitled "United States of America, Plaintiff, vs. Anna Laura Barnett, Maxine Sturgis; et al., Defendants," and a similar charge therein made, that the action of the Secretary of the Interior in the approval of the request of Jackson Barnett was done with full knowledge of all the facts in said bill detailed.

That a similar intervention was sought to be filed in

1926 by said officers of the Department of Justice in the United States Court for the District of Kansas, entitled "Elmer S. Bailey, Guardian of Jackson Barnett, an Incompetent, Plaintiff, vs. Harold C. McGugin, Walter S. Keith, et al., Defendants," in which intervention similar allegations were made, and in which it was alleged, speaking of the approval by the Secretary of the Interior and Commissioner of Indian Affairs of said gift and trust agreements as are alleged and set forth in the amended bill herein, that:

"* * * all thereof being done by the said named parties and Department officers, with full knowledge of all the facts, matters and things hereinbefore alleged."

That the original bill herein contains full and complete detail of fact showing clearly and conclusively that the action of the Secretary of the Interior and the Commissioner of Indian Affairs in respect to the gift referred to in the bill, to Anna Laura Barnett and the trust agreement, referred to in the bill, created by said Anna Laura Barnett and Jackson Barnett, with the approval of the said Secretary of the Interior, were all done by said Secretary of Interior and Commissioner of Indian Affairs with full knowledge of all the facts, matters and things charged in said original bill.

That a similar original bill to the one filed in this court in this cause was filed in the District Court of Kansas, on April 11, 1928, in an action against Harold C. McGugin, et al.; and that a similar original bill was filed in the United States District Court for the Southern District of California, on April 11, 1928, against Anna Laura Barnett, Maxine Sturgis and Leslie R. Hewitt, legal guardian of Jackson Barnett, in which similar allegations were made, and that a similar original bill was filed in the Supreme Court of the District of Columbia on the 11th day of April, 1928, against the Riggs National Bank, Anna Laura Barnett and [fol. 39] Maxine Sturgis; in all of which original bills similar charges were made, and all of which show conclusively upon their allegations that the Secretary of the Interior and Commissioner of Indian Affairs, when they approved the gift of Jackson Barnett and the trust agreement set

out and referred to in said original bills, did so with full knowledge of all the facts, matters and things so charged in said original bill.

That, of said suits, the one pending in the Southern District of New York has been tried, and evidence introduced, and the testimony offered in said action is a matter of record. That at the trial of the said New York case, the United States Attorney General, acting through the United States District Attorney, for the Southern District of New York, at the beginning of said trial, in open court, with leave of court, struck from the bill in said cause so filed, all charges or implications of fraud or corrupt practice on the part of the Secretary of the Interior, and all of the Department officials named and referred to therein, and withdrew from said bill in said cause all charges of fraud and implication of fraud against said officers in connection with the approval of the gift of said Jackson Barnett to the American Baptist Home Mission Society, and the transfer of the money and bonds to the Equitable Trust Company of New York, upon said request.

That, at the New York trial by the record of said cause, it was not charged, either in the bill or outside the bill that any official of the Department of Interior was deceived by anyone connected with the transaction complained of. That the testimony so taken shows conclusively that there was not only "no deception of said officials," but that there was—no attempt to deceive said officials, and no intention to deceive said officials, but that, on the contrary, said Department officials having charge of said transaction in the Department of the Interior, testified that they had full knowledge of all of the facts and acted thereon, and, should the same matter come before them on the same facts, they would again render the same judgment and approve the transaction.

That the evidence introduced at the New York trial, and which is now a matter of record in that cause, shows, as to the relation of the then Secretary of the Interior, Albert B. Fall, with the same transaction, as follows:

That the Honorable Charles H. Burke was Commissioner of Indian Affairs; that the matter of the negotiation of the gift of Jackson Barnett, at the suggestion of Commissioner Burke, was officially referred to A. J. Ward, Creek Tribal Attorney; that the Honorable E. B. Goodwin was, at the

[fol. 40] time of said negotiations, and the approval thereof, an assistant to the Honorable Albert B. Fall, the then Secretary of the Interior; that the Commissioner of Indian Affairs and the Assistant Secretary of Interior, F. M. Goodwin, aforesaid, conducted all of the negotiations of said matter with the Secretary of the Interior, and through them, and only through them, did Secretary Fall have any relation to the matter, and from them he acquired all the information which he possessed thereon, except as shown by the written recommendation made by A. J. Ward.

The undisputed testimony in that record shows that the Commissioner of Indian Affairs and the Assistant Secretary, Mr. Goodwin, both discussed the Barnett gift, and informed Secretary Fall substantially all of the facts set forth and charged in the original bill, insofar as it pertained to the gift of Jackon Barnett to his wife, Anna Laura Barnett; and further, the undisputed testimony of Mr. Goodwin was that he personally discussed the matter with Secretary Fall, after conferring with A. J. Ward, and after a conference with Jackson Barnett, and that he imparted to the Secretary the material facts connected with the gift of Jackson Barnett to Anna Laura Barnett, and the American Baptist Home Mission Society.

That, under the law and regulations of the Department of Interior, the Commissioner of Indian Affairs has jurisdiction and authority over the administration of Indian matters of the Five Civilized Tribes, subject to the approval of the Secretary, and that the Commissioner of Indian Affairs, Mr. Burke, in the Barnett matter, had full knowledge of all of the facts, and over his own signature recommended to Secretary Fall the approval by him of the gifts and trust agreements, aforesaid.

That, from the undisputed testimony of the record, A. J. Ward, at no time communicated with the Secretary of the Interior, save and only through the written memorandum accompanying the request of Jackson Barnett, in which the said A. J. Ward set forth substantially a history of the Jackson Barnett matter, conformable to and harmonious with the testimony offered in the New York case, much of which recital had been a matter of record in the Department of the Interior prior to the preparation of said memorandum.

That the first bills heretofore filed on behalf of the Department of Justice assailing the validity of the gifts aforesaid, were upon the theory that the action of the Secretary of the Interior in approving the donations was unauthor- [fol. 41] ized and void, because, as alleged, Jackson Barnett was an incompetent, and under the jurisdiction of the probate court of Okmulgee County, Oklahoma, and that said court had not granted its approval thereof.

That it was alleged in the first bills filed by the Department of Justice, that one Elmer S. Bailey was the duly authorized legal guardian of Jackson Barnett and his property, and that guardianship proceedings were commenced in 1912 by the appointment of one Carl J. O'Hornett, as guardian of the person and estate of Jackson Barnett in Okmulgee County, Oklahoma; that it was further charged in said first bills that the Commissioner of Indian Affairs and the Secretary of Interior, for the purpose of enabling them, in harmony with the regulations of the Secretary relative to the estates of Indians of the Five Civilized Tribes, to approve said donations and transfer said funds—wrongfully and unlawfully caused the amendment of the theretofore existing regulations, which amended regulations were approved by the Secretary of the Interior on October 7, 1922, and under which amended regulations the Secretary might disburse said funds, as requested by Jackson Barnett.

That on October 20, 1926, the Attorney General of the United States, over his own signature, approved an opinion written by Mr. George P. Barse, an Assistant to the Attorney General, in which opinion it was expressly stated that the Secretary of the Interior had the authority and power to make the amended regulation referred to, and that the County Courts of Oklahoma had no jurisdiction or authority over the estates and money of restricted Indians—the Jackson Barnett matter being directly under consideration. That upon said opinion, and under the direction of the Attorney General, aforesaid, all the allegations contained in the first bill, thus filed in the New York case, were stricken, insofar as they referred to or charged that the Secretary was without authority to make said amended regulation, and the allegation that the gifts aforesaid were invalid by reason of the failure of the County Court of Okmulgee County to approve the same.

That on November 30, 1926, and after the trial of the New York case had closed, but before the same had been briefed and submitted, the Supreme Court of the State of Oklahoma, in a cause entitled In re Appeal of Jackson Barnett, No. 17061, held and decreed that the appointment of Carl J. O'Hornett, in 1912, as legal guardian of the person and estate of Jackson Barnett, was void, and without any legal [fol. 42] effect, and that the appointment of Elmer S. Bailey as successor to said Carl J. O'Hornett was likewise void—the effect of said decision being that Jackson Barnett was not then, nor had he ever been at any time theretofore, under guardianship, as alleged and claimed by said Deprtment of Justice.

That, after the determination by the Attorney General, in 1926, that the County Courts of Oklahoma had no jurisdiction or authority over the restricted moneys of any full-blood member of the Five Civilized Tribes, and after the withdrawal from the New York case of all implications of fraud or wrong doing on the part of said officials, as had been charged in said first bills, said Department officials now representing the Department of Justice in the Barnett case, and in this case, changed their theory of the case, and proceeded upon the theory that Jackson Barnett was a mental incompetent, without sufficient understanding to enable him to initiate a gift of his property, and that, by reason thereof, the approval of the Secretary of the Interior was void and without legal effect.

The New York case was argued, briefed and tried upon that theory, and Judge John C. Knox's decision in that case reflects that sole and only issue before him.

That at no stage of the prosecution of the various suits hereinbefore mentioned and referred to until this amended bill was filed herein has there been any intimation or charge or claim that the Secretary of the Interior, Mr. Fall, was deceived by any person, but on the contrary, throughout the entire litigation it was urged and claimed that the said Secretary acted with full knowledge of all the matters charged.

In view of all of these things, the defendant herein, Marshall L. Mott, claims that the filing and the further attempted prosecution of the amended bill in this cause is made in bad faith, and with an oppressive and wrongful intent and purpose.

Wherefore, this court should strike from its files said amended bill, on the ground that said amendment is not made in good faith, and for a lawful and just purpose, and that said order should be so entered dismissing said amended petition, in order to prevent injustice and wrong being perpetrated upon the defendant, and to prevent him from being put to unjust and unreasonable expense and trouble in defending against the said amended bill.

Marshall L. Mott, by Chas. B. Rogers, His Attorney.

[fol. 43] *Duly sworn to by Marshall L. Mott. Jurat omitted in printing.*

Leave granted to file. F. E. Kennamer, J.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ON MOTION TO DISMISS—Filed Mar. 25, 1929

This cause coming on for hearing before the court upon motion of defendant to dismiss the amended bill of the plaintiff, and the United States, appearing by and through Charles B. Selby, Special Assistant to the Attorney General, suggesting to the court the probability that the Attorney eGneral of the United States will desire to file a substitute for the present pending amended bill, requests the court that the hearing on defendant's said pending motion be postponed to a later date. Thereupon, Charles B. Rogers, record counsel for defendant, Marshall L. Mott, in open court consenting that said matter be postponed to April 22, 1929, and the court thereupon orders that this cause be, and the same is hereby continued to April 22, 1929, to be heard at Oklahoma City, the United States to deliver a copy of its proposed amended, or substitute bill so desired to be filed, to the said Charles B. Rogers, not later than one week prior to the said 22nd day of April, 1929, and file its application for leave to file the original of said proposed

bill, with an attached copy thereof, with the clerk of this court.

Done in open court March 25, 1929.

John C. Pollock, Judge.

OK. Jno. M. Goldesberry, U. S. Attorney.

[File endorsement omitted.]

[fol. 44] IN THE UNITED STATES DISTRICT COURT

APPLICATION FOR LEAVE TO FILE SECOND AMENDED BILL OF COMPLAINT—Filed April 15, 1929

Comes now the United States, plaintiff in the above cause, by and through Charles B. Selby, Special Assistant to the Attorney General of the United States, and by direction of the said Attorney General of the United States, and moves this honorable court for an order granting leave to the United States to file an amended or substitute amended bill of complaint for the present pending amended bill of complaint, against which pending motions of the defendant are now directed, a true copy of which amended or substitute bill of complaint is hereto attached and made a part hereof, and in support of this application it is suggested and shown to the court that for a long time the United States has had similar causes pending in the federal courts of New York, Kansas, California and the District of Columbia, and has had under investigation the facts concerning the transaction set forth in the copy of the proposed bill hereto attached and sought to be filed, and but recently, and since the filing of the pending amended bill, has, through its Department of Justice, made further investigation into the transaction in said bills described, and forming the subject-matter of this and said companion suits, and has discovered other and further evidentiary matters not prior within the knowledge of said Department of Government and its officers, so far as relates to the defendant in this cause, and the coming of said matters into its hands, so far as relating to the defendant in the above cause is concerned, and after a further consideration of the law applicable to the facts averred as against the above named defendant, and relevant

to the issues tendered in said proposed bill as against defendant, which said matters require, in the judgment of the officers of the Department of Justice that the original of the attached copy hereto, be filed in the form in which the same now appears, in replacement of, and substitution for, said pending amended bill, against which pending motions of said defendant now stand directed.

Wherefore, the United States prays that the court by its order grant the United States leave to file said proposed amended or substitute bill in lieu of said pending amended bill, and second, that the court hear this application prior to the calling of the motion of defendant to dismiss the pending amended bill, and the alternative motion to strike portions thereof, and that upon a granting of this motion on behalf of the Government to file this substitute bill that [fol. 45] its order further provide that the same shall supersede the Government's present pending amended bill and defendant's said motions thereto.

The United States of America, by Charles B. Selby, Special Assistant to the Attorney General of the United States, duly assigned to this cause and record solicitor for the United States.

Duly sworn to by Charles B. Selby. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF FILING OF APPLICATION TO FILE SECOND AMENDED BILL OF COMPLAINT

To Charles B. Rogers, record solicitor for above-named defendant in above entitled and numbered cause:

Pursuant to order of Honorable John C. Pollock, United States Judge, made in the above entitled cause, in the federal court room at Tulsa, Oklahoma, within the above entitled Judicial District, on the 25th day of March, 1929, requiring service of a copy of the proposed amended or

substitute bill of complaint sought to be filed by the United States as plaintiff in the above entitled cause, which order [fol. 46] also directed the filing of an application with the clerk of said court for the filing of said proposed amended or substitute bill, the same to be heard by the said Honorable John C. Pollock at Oklahoma City, Oklahoma, on April 22, 1929, I hereby attach to this notice, and make the same a part hereof, a copy of said proposed amended bill so sought to be filed, together with a copy of the application so to be made to said court at said time, which said application you are advised is to come on for consideration in the federal court room in Oklahoma City, within the Western District of Oklahoma, on said last mentioned date, at the hour of 10:00 o'clock A. M. or as soon thereafter as said judge may hear the same.

Very respectfully, Charles B. Selby, Special Assistant to the Attorney General of the United States.

IN UNITED STATES DISTRICT COURT

SECOND AMENDED COMPLAINT

Comes now the United States of America, with leave of court first had and obtained to file this, its second amended bill of complaint, all under authorization and direction of the Attorney General of the United States and at the request of the Secretary of the Interior, for its second amended bill of complaint herein, in substitution for its first amended bill of complaint against defendant, avers and alleges as follows:

That Jackson Barnett, hereinafter more particularly mentioned, is a duly enrolled full blood member of the Creek Indian Tribe, one of the Five Civilized Tribes of Oklahoma; that as such member of said Tribe there was duly allotted to him, in manner as provided by law, his proportionate share of the tribal lands of said Creek Tribe, which land so thereto allotted is located in what was originally the Indian Territory but now comprising a part of the State of Oklahoma, and which lands so thereto allotted were, prior to the time herein particularly complained of, duly and as in manner provided by law, conveyed to the said Jackson Barnett

in fee simple and in extinguishment of all prior reversionary interest of the United States therein, subject only to the restriction against the alienation thereof prior to April 26th, 1931, except upon the removal of the said restriction by the Secretary of the Interior; that the said Jackson Bar-
[fol. 47] nett ever since has been, and now is, the owner of said land; that said Jackson Barnett is now about the age of seventy-eight years, is without issue and at all times herein mentioned was, and now is, illiterate, mentally incompetent and wholly incapable of managing his own affairs, or of caring for his property and person and unable to appreciate or understand the nature, or extent of his property.

The United States further complaining avers that in 1912 one Carl J. O'Hornett, of Okmulgee County, Oklahoma, the county of the then residence of said Jackson Barnett, was by order of the County Court of said county and state, appointed guardian of the person and estate of the said Jackson Barnett, and until November 30th, 1926, the said O'Hornett, or his sucessor, Elmer S. Bailey, acted as such guardian, and during all of said time were respectively recognized and treated as such by the courts of Oklahoma, of the United States, by the Department of the Interior, by Barnett and his purported wife and by all parties mentioned in this amended bill of complaint and particularly by the defendant, Marshall L. Mott, on which last mentioned date the said appointment of the said O'Hornett, and of his successor, Bailey, as such guardian, was by the Supreme Court of Oklahoma held to be void.

The United States, further complaining, avers that in the said year 1912, and while the said O'Hornett was acting as such guardian, a departmental oil and gas lease of the land so allotted and conveyed to, and owned by the said Jackson Barnett, was executed by the said Jackson Barnett and the said Carl J. O'Hornett, as guardian aforesaid and approved by the said County Court and by the then Secretary of the Interior of the United States, in pursuance of the terms of which and of the regulations promulgated by the Secretary of the Interior, the royalties accruing from and payable upon the oil and gas removed from said land by the lessee were paid to the Superintendent of the said Five Civilized Tribes of Indians, or to his predecessor, offi-

cers of the United States in the said Department of the Interior and daly authorized to collect and receive the same, and which said royalties by said officers so received and accumulated in their custody were transmitted to the Secretary of the Interior and by him invested in Liberty bonds of the United States in the name of said Barnett and thereafter and until the times hereinafter more particularly complained of, were held therefor in the Treasury of the United States in the name of said Jackson Barnett, the face value of the principal amount of which, on February 1st, 1923, [fol. 48] was in the sum of One Million, One Hundred Fifty-six Thousand, Seven Hundred Fifty Dollars ($1,156,750.00).

The United States further avers that shortly before said last named date, Albert B. Fall, the then Secretary of the Interior, having through his said Department of the Interior requested of, and having received of said bonds the face principal of One Million One Hundred Thousand Dollars ($1,100,000.00) from the said Treasury of the United Sttaes, did, on or about said day and date, obtain and cause to be delivered to one A. J. Ward of said bonds so held in trust in the face value in the principal sum of Five Hundred Fifty Thousand Dollars ($550,000.00) for delivery and payment to the Equitable Trust Company a corporation of New York, which said bonds, so received by the said Ward, were, by the said Ward, thereupon delivered to the said Equitable Trust Company, as trustee, to be thereby held in trust pursuant to the terms of certain writings whereby said Equitable Trust Company agreed to hold said bonds so thereby received, as trustee and in trust and from the income of which to pay to the said Jackson Barnett the sum of Twenty Thousand Dollars ($20,000.00) yearly so long as he should live, and to devote the remainder of the said Jackson Barnett and all of the income thereof, during the lifetime of the said Jackson Barnett and all of the income thereafter to certain uses of the American Baptist Home Mission Society of New York, and the United States avers that at the same time, in conjunction with, and as a part of the same transaction of delivery of said bonds to the said Ward, the said Albert B. Fall authorized and caused to be delivered to one Anna Laura Barnett, the purported wife of the said Jackson Barnett, the remainder of said One Million One Hundred Thousand Dollars ($1,100,000.00) of

said bonds, to wit: in the face principal sum of Five Hundred Fifty Thousand Dollars ($550,000.00), which previously, as aforesaid, were held in trust in the Treasury of the United States in the name of the said Jackson Barnett, and which delivery of said bonds to the said Anna Laura Barnett was in pursuance of an agreement on her part to cause certain of said bonds of the face value in the principal sum of Two Hundred Thousand Dollars ($200,000.00) to be placed in trust in the Riggs National Bank of Washington, D. C., upon conditions that out of the income of said bonds so placed in trust the sum of Seven Thousand Five Hundred Dollars ($7,500.00) be paid yearly to the said Jackson Barnett as long as he should live, and the remainder of said income during the lifetime of said Jackson Barnett to be paid to the said Anna Laura Barnett and upon the death of said Jackson Barnett all of the said income and from time to time thereafter, various portions of the principal [fol. 49] thereof and of the body of the trust so created to be paid to the said Anna Laura Barnett or to her daughter Maxine Sturgis until the entire principal, or body of said trust should be so paid and become and remain the sole property of said Anna Laura Barnett of her said daughter. That of the remainder of said bonds so by the said Anna Laura Barnett received, the same were to become and be her sole, free and unrestricted property. That said agreement upon which bonds of the face value of Two Hundred Thousand Dollars ($200,000.00) principal sums were so delivered to said Anna Laura Barnett was performed and the same were accordingly placed in trust in said bank as trustee.

The United States further complaining avers that the accruing annual interest as provided in the said bonds so delivered to the said A. J. Ward and by him to said Equitable Trust Company and to the said Anna Laura Barnett and to the said Riggs National Bank on said 1st day of February, 1923, amounted to a sum in excess of Fifty Thousand Dollars ($50,000.00) and further avers that the said payment and delivery of all of said bonds as aforesaid, was wholly without consideration moving to or from any person.

The United States avers that at no time was Jackson Barnett able to read or write any language, or to understand elementary arithmetic, or to readily comprehend the Eng-

lish language, nor by reason of his mental infirmity was he able to appreciate the nature or amount of his property, or to realize the portions of it so disposed of and distributed, nor was he, at the times complained of, able to understand, and at no time since has understood, the terms and conditions upon which the said delivery of said bonds was made by the said Secretary of the Interior.

The United States avers that the said distribution and delivery of said bonds by the Secretary of the Interior was made and based upon a purported request in writing, bearing the thumb print signature of the said Jackson Barnett thereto, the nature, purpose, import and effect of which he, by reason of his mental infirmity, was wholly unable to comprehend and understand, and which he at all times since has been wholly unable to comprehend and understand, which writing was drawn and drafted by the said A. J. Ward, the then Creek National Attorney, which instrument, together with letters from the said Creek National Attorney and the Commissioner of Indian Affairs containing recommendations that the said Albert B. Fall, Secretary of the Interior, authorize and cause to be made the payments and deliveries of said bonds in accordance with the said thumb print in-
[fol. 50] strument of request of the said Jackson Barnett, were transmitted to the said Albert B. Fall, Secretary of the Interior. The United States avers that said letters of recommendation contained the statement that said Jackson Barnett had been adjudged an incompetent by said Okmulgee County Court and that a guardian has been appointed over the person and estate of the said Barnett and was then acting as such and further avers that upon receipt of said letters of recommendation the same were approved by the said Secretary of the Interior and the aforesaid payments and deliveries of said bonds were authorized and directed to be made by the said Secretary Albert B. Fall, indorsing upon the said letter of recommendation of the said Commissioner of Indian Affairs the word "Approved" together with the then date and his official signature.

The United States avers that at no time prior to the making of said payments and deliveries of said bonds was the said guardian informed thereof, nor had he information that the purported thumb print request of said Barnett had been executed, nor that the authorizing or making

of said payments and deliveries of said bonds was in contemplation by any person, and said payments and deliveries of said bonds were made wholly without his knowledge, and without knowledge of or notice to said Okmulgee County Court, and the United States avers that the said distribution and delivery of said bonds were not, and at no time have been for the benefit of Jackson Barnett, and that neither the said Albert B. Fall, Secretary of the Interior, nor any other officer or agent of the Government of the United States was at any time authorized by law to make said payments and deliveries of said bonds of the said Jackson Barnett for the purposes aforesaid, and that all of said acts of the said Secretary of the Interior, Albert B. Fall, and all other officers and agents of the United States participating in the said distribution and disposition of said bonds were without warrant and authority of law and the said distribution and disposition of said bonds in all respects was not only without warrant and authority of law but contrary to the purpose, intent and effect of the law in such case made and provided.

The United States further complaining avers that the said Anna Laura Barnett, immediately upon receipt of said bonds, as alleged, delivered One Hundred Fifty Thousand Dollars ($150,000.00) face principal thereof, to one Harold C. McGugin, who thereupon delivered Fifteen Thousand ($15,000.00) Dollars face principal thereof to the defendant, Marshall L. Mott. That the said Harold C. [fol. 51] McGugin and defendant Marshall L. Mott, prior to the receipt thereby of the said bonds so respectively received by them, as herein alleged, had actual knowldge of all of the facts, circumstances, matters and things recited and averred herein, and received said respectively designated bonds with full knowledge of the fact that the same had directly come to and into the hands of and through the said Anna Laura Barnett from the said Secretary of the Interior, Albert B. Fall, and the subordinates of his department in the manner hereinbefore alleged, and that the same were the property of Jackson Barnett and procured from oil royalties on oil taken from his said restricted lands and each well knew and for a long time had well known that the said Jackson Barnett was a

mental incompetent, and without mental capacity to make or to initiate the purported disposition and distribution of said bonds, and each thereof particularly at all times well knew and understood that the said bonds so thereby received were the property of said Jackson Barnett, subject to the trust character thereof in the United States therein through the Interior Department and the duty thereof to preserve, conserve and protect the same under the restrictions thereon imposed by Congress, and without consideration moving to or from any person on account of the said bonds so thereby respectively received.

The United States further avers that the defendant Marshall L. Mott has at all times retained the said bonds so by him received, or the converted form thereof, and at no time has accounted to the United States for any part thereof, but has refused and still refuses so to do.

The United States avers that it is without knowledge as to the denomination, number, description or series of the bonds so received by the said Marshall L. Mott as aforesaid and is therefore unable to more particularly described the same than as in this complaint set forth; nor is the United States informed or advised as to whether or not said defendant retains the specific and particular bonds so received by him, or whether or not he has converted the same into money, or other property, but does aver that the same by the terms thereof provided for interest thereon at the rate of four and one-half per cent (4½%).

The United States avers that it brings this proceeding in its name for the relief hereinafter prayed, for the use and benefit of the said Jackson Barnett in the discharge of its duty and the trust in protection and preservation of the said property so herein involved and referred to as the restricted proper of the said Jackson Barnett, so received by the defendant Marshall L. Mott as in this complaint alleged, [fol. 52] and the United States by and through its Attorney General hereby authorizes the prosecution of this proceeding by John M. Goldesberry, United States Attorney for the Northern District of Oklahoma and by Charles B. Selby, Special Assistant to the Attorney General under written assignment hereto by the said Attorney General heretofore filed in this cause and court.

Wherefore, premises considered, the United States prays that the defendant, Marshall L. Mott, be required to answer herein, but not under oath, which oath is hereby waived, and that said refendant in his answer be required to fully disclose by description of series, denomination, number and date the bonds so by him received as in this complaint alleged, as well as the time when by him received and the rate of interest therein provided, and that he disclose in his answer if said bonds so by him received are in his custody and now owned by him, or otherwise.

The United States further prays that if in answer or upon a hearing herein, it be disclosed that defendant retains said bonds as owner and in his custody, that this court by its decree order and require said defendant to surrender the same into this court for delivery thereof to the Secretary of the Interior for the use and benefit of the said Jackson Barnett, to be thereby retained and held subject to the restrictions thereon imposed by law to the exclusion of all claim of interest, or right therein by the defendant forever; and in the alternative, if it be disclosed at the hearing of this cause that the defendant has converted said bonds, or any part thereof, by transfer or otherwise, then that the United States have and recover judgment for and on behalf of the said Jackson Barnett against said defendant, for such amount of said bonds as may have been converted, together with interest thereon at the rate of four and one-half per cent per annum from the 1st day of February, 1923, and for the costs of this cause, and if in anywise mistaken in its prayers herein, that the United States for the use and benefit of the said Jackson Barnett, have all other, further general and special relief to which it and the said Jackson Barnett shall be in equity and good conscience entitled under the facts in this case and as in duty bound it will ever pray.

William D. Mitchell, Attorney General of the United States, by Charles B. Selby, Special Assistant to the Attorney General of the United States. John
[fol. 53] M. Goldesberry, United States Attorney, Northern District of Oklahoma. Charles B. Selby, Special Assistant to the Attorney General of the United States.

I hereby acknowledge service of a true and correct copy of each instrument herein contained. 4/15/29

Chas. B. Rogers Attorney for Defendant, Marshall L. Mott.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OBJECTIONS OF DEFENDANT TO THE GRANTING OF LEAVE TO FILE A SECOND AMENDED BILL—Filed May 4, 1929

Comes now the defendant, Marshall L. Mott, and objects to the granting of the application of the United States for leave to file a second amended, or substitute, bill in this cause, for the following reasons, and upon the following grounds, to-wit:

1. That said second amended bill does not set forth allegations showing any cause of action on the part of the United States of America against the defendant, either in law or in equity.

2. That said second amended bill does not state allegations which entitle the United States to the relief prayed for therein.

3. That said second amended bill does not allege any new matters not heretofore pleaded in the original and first amended bills, and does not state a cause of action at law or in equity in favor of the United States against the defendant.

4. That said second amended bill attempts to assail in this court an official act of the Secretary of the Interior, done in the course of his duty, free from fraud or deception, and wherein he has exercised his discretion in the disposal of royalties received under an oil and gas lease upon the restricted lands of a full-blood Creek Indian, and in persuance to amended section 24 of the regulations of said Secretary, lawfully made and promulgated, and done at the request of and for the interest and benefit of said Indian, which this court has heretofore, in this cause, duly deter-

[fol. 54] mined and decided cannot be done.

5. That this court has already duly decided and determined the sole questions of law and rights of the United States as set forth in the proffered second amended, or substitute, bill, adversely to the United States, from which decision no appeal has been taken or announced, and thereafter, the United States filed in this court a first amended bill, in which it made allegations attempting to charge that the Secretary of the Interior Mr. Fall, had been deceived by certain representations made to him in connection with the request of Jackson Barnett for the transfer of bonds, in said bill referred to, which allegations of deception were directly contrary to and irreconcilable with repeated and various allegations in the original bill herein, and in bills filed by the United States in the Southern District of New York, in the Supreme Court of the District of Columbia, the District of Kansas, the Northern District of Oklahoma, and in the Southern District of California, involving the same transactions contained and set forth in the bills filed in this cause, wherein the United States charged that said official action, in this cause complained of, was taken by the Secretary of the Interior, with full and fair knowledge of all the matters, facts and circumstances in said first amended bill herein charged and set forth as the matters, facts and circumstances about which he had been deceived.

6. That the cause of action, if any be there set forth, which is pleaded in said second amended bill now tendered and for leave to file which, application is filed herein, is wholly barred and suspended by the terms and provisions of an Act of Congress entitled "An act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force in reference to suits involving Indian Titles, the Statutes of Limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes," Approved April 12th, 1926 (Pub. Doc. No. 98—69th Congress, H. R. 4761), and said action cannot now be maintained.

Respectfully submitted.

Marshall L. Mott, by Chas. B. Rogers, His Attorney.

[File endorsement omitted.]

[fol. 55] In United States District Court

Opinion on Application of Complainant for Leave to File a Second Amended Bill of Complaint—Filed May 4, 1929

By this suit the Government, as guardian of a full blood Creek incompetent Indian, one Jackson Barnett, seeks the recovery of fifteen thousand dollars of government bonds heretofore held by the Honorable Secretary of the Interior in trust for said Barnett under the provisions of sections one and two of the Act of Congress 1908, said bonds having been by the Secretary purchased for the account of said incompetent Indian Barnett, out of accumulated royalties coming into his hands from oil and gas leases made by the Indian on his restricted allotment in the Creek Nation, said oil and gas leases having been made with the consent and approval of the Commissioner of Indian Affairs and the Secretary of the Interior representing the Government.

The fact is, out of a very large amount of cash and bonds in the hands of the Honorable Secretary of the Interior derived from royalties on oil and gas found and produced on the restricted lands of the Indian, Jackson Barnett, being thereto so requested, and after being fully advised, the Honorable Secretary turned over to the use and possession of the wife of said Indian, Jackson Barnett, one Anna Laura Barnett, a large amount of bonds theretofore held in trust in his possession for the use and benefit of said Jackson Barnett, and at the same time caused to be pledged in the Equitable Trust Company of New York the further sum of five hundred thousand, face value, of bonds to be by that institution held in trust and a portion of the proceeds paid to said Jackson Barnett. Of the bonds of Jackson Barnett so held in trust by the Honorable Secretary of the Interior and so distributed to Anna Laura Barnett she paid over and delivered to one Harold C. McGugin, her attorney, the sum or amount face value of one hundred and fifty thousand dollars. Thereafter, he, the said McGugin, paid over and delivered to defendant herein the sum or amount, face value, of fifteen thousand dollars of said bonds. This sum or amount of said bonds, or their value, the Government seeks to recover from defendant by decree

in this present suit. In a suit in the Kansas District a bill was filed by the Government to recover against said McGugin the bonds so distributed to the wife of Barnett and turned over to said McGugin. This bill on motion of defendant was dismissed. The original bill of complaint in this suit, in form and averments like that in the McGugin case, was on motion of defendant dismissed. Thereupon the Government was granted leave to file an amended bill of complaint, to which amended bill of complaint, when [fol. 56] filed, defendant again filed a motion to dismiss. The Government virtually confessing said motion to dismiss the amended bill of complaint again came into court and requested leave of court to file a second amended bill of complaint. On this application for leave to file the second amended bill of complaint and on objections to the granting of such leave, the parties have been heard in oral argument and on printed and written briefs, and the matter comes now on for decision.

The Government in this second amended bill of complaint bottoms its right to a recovery, as I understand the case, on the fact that Jackson Barnett was so ignorant and incompetent of mind he could not and did not understand or know what he was requesting in his application to the Honorable Secretary of the Interior for the distribution of his accumulated royalties in the form of bonds held in trust by the Secretary. Now there is no charge in this suit of fraud or corruption made against the Secretary or any one connected with the transaction in any manner representing the government in the distribution of the accumulated royalties in the hands of the Honorable Secretary of the Interior. The case must therefore rest upon the power conferred upon the Honorable Secretary of the Interior to handle and distribute the funds held in trust in his possession arising out of the royalties paid on the extraction of oil and gas from the restricted lands of the incompetent Indian, Jackson Barnett. The reason behind the care and solicitude of the Government for its Indian wards arises from the fact Indians from their lack of business training have always been a prey for shrewd, calculating, unscrupulous white men. Therefore, the Government felt compelled to intrust the property of incompetent Indians like Barnett to agencies of the Government created by Congress for

that purpose. By sections one and two of the Act of Congress, 1908, a plan was adopted of protection of the property rights of incompetent Indians occupying the status of Jackson Barnett. This plan was the creation of a trust in the hands of and under the judgment, control and discretion of the Honorable Secretary of the Interior as to custody and ultimate distribution of the same. In the opinion of the Attorney General of October 20 ,1926, concerning the property of Jackson Barnett, the Attorney General said:

"Congress saw fit to accomplish its purpose of protection of the Indian by creating a trust, by sections 1 and 2 of the Act of 1908, and vested the administration of it in the Secretary of the Interior, without specific limitation of the manner in which he might administer. Hence, the power [fol. 57] so conferred is broader than any power which might have been specifically conferred."

In the exercise of this power the Honorable Secretary of the Interior on October 7, 1922, promulgated and amended regulation applicable to this case, as follows:

"And provided further, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in said cases."

That the Secretary of the Interior, holding the property derived from accumulated royalties in his hands in trust for the incompetent full blood Creek Indian Jackson Barnett, had full power and authority to make the distribution he did in this case, and to bind the Government thereto, is settled by adjudications binding here. See Parker v. Richard, 250 U. S. 236; U. S. v. Hinkle, 261 Fed. 518, and many other cases.

It follows, as there is no question of fraud charged or raised in this case against the act of the Honorable Secretary of the Interior, the Commissioner of Indian Affairs, or other person representing him in the handling of the funds

of Jackson Barnett, that action must be approved as done under full power and authority conferred upon the Secretary of the Interior by the Congress. And the motion to file the second amended bill of complaint must be denied.

It is so ordered.

John C. Pollock, U. S. District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO FILE SECOND AMENDED BILL OF COMPLAINT—Filed May 16, 1929

This cause coming on for hearing on the verified application of the United States herein filed for leave to file a second amended or substitute bill of complaint, a copy of which is attached to said application, and on the objections to the granting of said application heretofore filed by defendant Marshall L. Mott, the United States appearing [fol. 58] by Mr. Charles B. Selby, Special Assistant to the Attorney General, and the defendant appearing by his record counsel, Mr. Charles B. Rogers, of Tulsa, Oklahoma, the court, after a consideration of said application and objections thereto, on written argument and briefs of the respective counsel herein, submitted by order of this court, and after being fully advised in the premises, finds and determines as follows:

That the original bill in this cause was dismissed by the Honorable Franklin E. Kennamer, Judge of this said court on motion of the defendant, for the reason that said original bill was insufficient in statement of facts to constitute a valid cause of action in equity against defendant in favor of the United States, and that, thereafter, on leave of court, an amended bill of complaint was filed by the United States herein, against which a motion to dismiss, filed by the defendant herein, was directed, based on the same reasons and grounds as were directed against said original bill of complaint, pending which latter motion, on request the United States was given leave to file its application to file a new amended and substitute bill of complaint, with the copy of such proposed new amended bill of complaint desired to be filed to be thereto attached, and all of which

was regularly filed herein, by reason of which, as a matter of law, the United States confessed the insufficiency of, and abandoned its said first amended bill of complaint above, and:

The Court heretofore, on May 4th, 1929, after a full consideration of the premises aforesaid, having filed in this cause a memorandum of decision on said application of the United States for leave to so file a second amended bill of complaint herein, in form shown by the copy thereof attached to its said application, finding and holding in said memorandum decision that the said proposed amended or substitute bill of complaint is insufficient in statement of facts to constitute a valid cause of action in equity in favor of the United States and against the defendant, and, for that reason, the said application should be denied.

Now, therefore, in accordance with said finding and conclusion aforesaid, it is by the court ordered, adjudged and decreed that said application of the United States for leave to file its said second amended bill of complaint, as shown by copy thereof attached to the said application, be and the same is hereby denied, and this cause is dismissed, to which findings, conclusion, orders, judgment and decree the complainant, United States, by its said counsel at the time excepts and which exceptions are thereto allowed.

[fol. 59] Given at Tulsa on this 16 day of May, 1929.

John C. Pollock, Judge.

Approved as to form:

—— ——, United States District Attorney, Northern District Oklahoma. Charles B. Selby, Special Assistant to the Attorney General of the United States. Chas. B. Rogers, Atty. for M. L. Mott.

In United States District Court

Petition for Appeal and Order Allowing Same—Filed June 15, 1929

To the Honorable John C. Pollock, District Judge:

Comes now the United States of America, plaintiff above named, by and through its attorneys, John M. Goldesberry, United States Attorney for the Northern District of Oklahoma, and Charles B. Selby, Special Assistant to the Attor-

ney General of the United States, each hereunto duly authorized, and feeling itself aggrieved at the decision and judgment rendered and entered herein by the court on May 4th, 1929, and by the decree thereon rendered and entered herein on the 16th day of May, A. D. 1929, by which it was adjudged and decreed that the written, verified application of the United States of America for leave of court to file herein with the clerk of this court a second amended bill of complaint against said defendant, Marshall L. Mott, tendered and offered for filing at the time of presenting said application to this court, be and was denied and this cause dismissed, in which said adjudication and the proceedings had in connection with the entry thereof, certain errors were committed prejudicial to the plaintiff, from which said decision, adjudication and decree, by reason of said errors, the United States of America does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit of the United States, for the reasons set forth in the assignments of error filed herewiih.

[fol. 60] Wherefore, the United States of America, plaintiff herein, prays that an appeal herein may be to it allowed to the said United States Circuit Court of Appeals for the said Tenth Circuit of the United States for the correction of the said errors so complained of and that citation be issued herein as by law provided, and that a transcript of the record, proceedings, papers and documents involved in this appeal and upon which said adjudication and decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the said Tenth District of the United States under and in conformity with law and the rules of court in such cases made and provided.

Dated at Tulsa, Oklahoma, June 11, 1929.

Jno. M. Goldesberry, United States District Attorney, Northern District of Oklahoma; Charles B. Selby, Special Assistant to the Attorney General of United States, Attorneys for United States of America, Plaintiff.

Appeal as prayed for is hereby allowed.

Dated at Kansas City, June 15th, 1929.

John C. Pollock, United States District Judge.

[File endorsement omitted.]

In United States District Court

Assignments of Error—Filed June 15, 1929

Comes now the United States of America, plaintiff herein, by its attorneys John M. Goldesberry, United States Attorney for the Northern District of Oklahoma, and Charles B. Selby, Special Assistant to the Attorney General of the United States, each thereof duly hereunto authorized, and files the following assignments of error upon which it will rely in the prosecution of its appeal from the decision, adjudication and decree of this court herein rendered and en-
[fol. 61] tered on the 4th day of May, 1929, and on the 16th day of May, 1929.

First. That the United States District Court for the Northern District of Oklahoma in said cause erred as a matter of law in holding and deciding, and in accordance therewith adjudging and decreeing that the second amended bill of complaint on behalf of the plaintiff United States of America, tendered and offered thereby for filing at the time of presenting and hearing of said application was insufficient in statement of facts to constitute a valid cause of action in equity in favor of the United States and against the defendant.

Second. That said District Court of the United States for the Northern District of Oklahoma in said cause erred in its decision and holding, and in accordance therewith, adjudging and decreeing that the proposed second amended bill of complaint tendered and offered for filing at the time of presenting said application for leave and permission to file the same, was insufficient in statement of facts to constitute a valid cause of action in equity in favor of the United States and against the defendant and in ordering, adjudging and decreeing a denial of said application of the plaintiff, the United States of America, and in dismissing plaintiff's cause of action.

Third. That the said District Court of the United States erred in refusing to hold and to decide and to accordingly adjudicate and decree, that the said proposed second amended bill of complaint tendered and offered for filing by the plaintiff, the United States of America, at the time of presenting for consideration to the court the said applica-

tion for permission of court to so file the same, stated facts sufficient to constitute a valid cause of action in equity in favor of the plaintiff United States of America and against the defendant, Marshall L. Mott.

Fourth. That the said District Court of the United States for the Northern District of Oklahoma in said cause erred in refusing to hold and to decide and to accordingly adjudicate and decree, that the proposed second amended bill of complaint tendered and offered for filing at the time of presenting for consideration to the court said application for permission of court to so file the same, stated facts sufficient to constitute a valid cause of action in equity in favor of the plaintiff, the United States of America, and against the defendant, Marshall L. Mott, and in refusing to grant leave and permission to the plaintiff, the United States of America, to file its said second amended bill of complaint.

[fol. 62] Fifth. That said District Court of the United States for said Northern District of Oklahoma in said cause in its conclusion, holding and adjudication herein erred in concluding, holding and adjudicating that the plaintiff, the United States of America, by the filing and presenting of its said application for leave to file said second amended bill of complaint, as a matter of law, confessed defendant's motion directed against and abandoned its said amended bill of complaint.

Sixth. That said decision, adjudication and decree of said District Court of the United States for the Northern District of Oklahoma, in refusing leave and permission to the plaintiff, the United States of America, to file its said second amended bill of complaint tendered with said application for leave to so file the same, and in dismissing the cause, was an abuse of judicial discretion and power.

Wherefore, the United States of America, plaintiff and appellant herein, prays that the holding decision, adjudication and decree of said District Court of the United States for the said Northern District of Oklahoma, so herein complained of, be reversed and that said District Court for said Northern District of Oklahoma, be ordered to enter a decree so reversing its said holding, decision, adjudication and decree.

Dated at Tulsa, Oklahoma, this 15th day of June, A. D. 1929.

Jno. M. Goldesberry, United States Attorney, Northern District of Oklahoma; Charles B. Selby, Special Assistant to the Attorney General of the United States, Attorneys for Plaintiff, United States of America.

[File endorsement omitted.]

Citation, in usual form, showing service on Charles B. Rogers, Filed June 15, 1929, omitted in priting.

[fol. 63] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 17, 1929

To H. P. Warfield, Clerk of the United States District Court for the Northern District of Oklahoma:

You will please incorporate in the transcript of the record on appeal taken by the United States of America, Appellant, versus Marshall L. Mott, Appellee, No. 343 Equity, the following portions of the record thereof, to-wit:

[fol. 64] 1. Amended bill of complaint by the United States of America, filed herein on the 13th day of Sept. 1928.

2. Motion of Marshall L. Mott to dismiss, filed on the 29th day of Sept. 1928.

3. Supplemental motion of Marshall L. Mott to dismiss, filed on the 10th day of Oct. 1928.

4. Order of Pollock, Judge, dated March 25, 1929, continuing defendant's motion for hearing in Oklahoma City to April 22, 1929, and providing for hearing application of United States to file a second amended bill of complaint at that time, said order being filed on the 25th day of March, 1929.

5. Verified application of the United States for leave to file a proposed amended bill of complaint on behalf of the United States, with verification thereof by Charles B. Selby, to which application, and forming a part thereof, is attached the proposed second amended bill of complaint sought to be filed, and to which is attached also notice served on Charles B. Rogers of the filing of application and acknowledgment of service thereof, filed on the 15th day of April, 1929.

6. Objections of defendant to the granting of leave to file Government's second amended bill, submitted to the court April 22, 1929, at Oklahoma City, and by the court returned to the clerk and filed May 4, 1929.

7. Memorandum decision of Pollock, Judge, overruling Government's application, filed May 4, 1929.

8. Final order or decree of Pollock, Judge, denying the Government's right to file second amended bill and dismissing Government's case, filed on May 16, 1929.

9. Petition of United States of America for allowance of appeal to United States Circuit Court of Appeals for the Tenth Circuit, filed on the 15th day of June, 1929.

10. Order of Pollock, Judge, allowing appeal, filed on the 15th day of June, 1929.

11. Citation to defendant, Marshall L. Mott and Charles B. Rogers, record attorney, on appeal, filed on the 15th day of June, 1929.

12. Assignments of error on behalf of United States, filed on the 15th day of June, 1929.

13. Direction to clerk to print record.

[fol. 65] 14. This praecipe for transcript and stipulation, and acknowledgment of service hereof by counsel for appellee.

Appellant further requests that said record be printed under the supervision of the clerk of this court and that same be filed in the office of the clerk of the United States

Circuit Court of Appeals for the Tenth Circuit at Denver, Colorado, on or before the 24th day of July, 1929.

Jno. M. Goldesberry, United States Attorney for the Northern District of Oklahoma; Louis N. Stivers, Assistant United States Attorney for Northern District of Oklahoma; Chas. B. Selby, Special Assistant to Attorney General of the United States, assigned to this Cause, Solicitors for Appellant, United States of America.

Acknowledgment of Service and Stipulation

Service of the foregoing præcipe for transcript and receipt of a true and correct copy thereof is hereby acknowledged as personally made upon me this 15th day of June, 1929.

It is stipulated and agreed between the respective solicitors for the respective parties hereto that upon the filing of the above and foregoing praecipe the clerk may approve the printing on appeal of the portions of the record therein indicated, and it is further stipulated and agreed between the parties that time to suggest additional portions of the record is hereby waived by the appellee, and that the record on appeal may be printed as indicated in the foregoing praecipe.

Jno. M. Goldesberry, United States Attorney for the Northern District of Oklahoma; Louis N. Stivers, Assistant United States Attorney for the Northern District of Oklahoma; Chas. B. Selby, Special Assistant to Attorney General of United States, [fol. 66] Assigned to this Cause, Solicitors for Appellant, United States of America. Chas. B. Rogers, by E. S. Booth, Record Solicitor for Appellee, Marshall L. Mott.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

Appearances of counsel omitted in printing.

[fol. 67] Minute entry of argument and submission October 30, 1929, omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, OCTOBER TERM, 1929

Mr. Charles B. Selby, Special Assistant to the Attorney General, (Mr. Seth W. Richardson, Assistant Attorney General of the United States, Mr. John M. Goldesberry, United States Attorney, and Mr. Louis N. Stivers, Assistant United States Attorney, were with him on the brief), for appellant.

Mr. Edwin S. Booth (Mr. Chas. B. Rogers was with him on the brief), for appellee.

Before Lewis, Phillips, and McDermott, Circuit Judges

OPINION—Jan. 27, 1930

LEWIS, Circuit Judge, delivered the opinion of the court.

This suit was brought by the United States in behalf of one Jackson Barnett, a full-blood Creek Indian, to recover of appellee Mott $15,000 face value U. S. Government Bonds, or their proceeds or value if they have been converted. It is alleged that the bonds are the property of Barnett and that they came into the possession of Mott in this way: Barnett was allotted 160 acres out of Creek Tribal lands, which proved to be valuable in oil deposits. With the approval of the Secretary of the Interior the land was leased and large sums came into his possession from royalties paid for the oil produced, and these royalties were invested in United States bonds, amounting in face value to more than one million dollars. The bonds were held by the Secretary of the Treasury. Early in 1923 Barnett and his wife went to Washington, and with assistance of counsel sought to induce the Secretary of the Interior to deliver to them $1,100,000 face value of these bonds, with the understanding that they would be used or disposed of as hereinafter stated. He finally complied with their request, got the bonds from the Treasury and $550,000 in face value were delivered to the Equitable Trust Company of New York, which was to hold them as trustee and from the in-

come pay Barnett $20,000 yearly so long as he should live, [fol. 69] the remainder of the income until Barnett's death to go to the American Baptist Home Mission Society of New York, and on the death of Barnett all of the income to be paid to that society. At the same time the additional $550,000 face value U. S. bonds belonging to Barnett were turned over to Barnett's wife, whom he had recently married and who is a white woman. Of the bonds so turned over to Barnett's wife the understanding was that she should deposit $200,000 thereof in the Riggs National Bank of Washington, D. C., to be held in trust, and of the yearly income $7,500 was to be paid to Barnett during his life, the remainder of the income during that time, if any, to be paid to his wife, and upon his death the whole income and various portions of the principal, were from time to time to be also paid to her or to her daughter until all thereof had been so paid. She complied with this part of the arrangement and deposited the $200,000 in bonds with the bank. Of the remaining $350,000 face value of said bonds turned over to her she immediately delivered $150,000 thereof to Harold C. McGugin, who appears to have been the chief adviser in the whole affair, and McGugin delivered $15,000 face value of said bonds to the defendant Mott. These are the bonds sued for.

Plaintiff further charged that the Secretary of the Interior, McGugin, Mott and others who participated in the transaction knew that all of the bonds were the property of Barnett and had been purchased for him with royalties on oil taken from his restricted allotment; they also knew that Barnett was a mental incompetent without capacity to make or to initiate the disposition and distribution of said bonds and that the officers of the United States participating in the transaction were without authority of law to dispose of said bonds in the manner stated, and that the disposition made of them was contrary to the purpose, intent and effect of the law in such case; that Barnett at the time was of the age of about 70 years, illiterate, mentally incompetent and wholly incapable of managing his own affairs or of caring for his property, and unable to appreciate and understand the nature and extent thereof, and that the delivery and distribution of said bonds was based upon a purported request in writing bearing the thumb print of

said Barnett, which by reason of his mental infirmity he was wholly unable to comprehend and understand.

The foregoing facts were alleged in a second amended complaint. The original complaint is not in the record. The first amended complaint contains in substance the allegations of fact that have been stated, and in addition thereto [fol. 70] it charged fraudulent conduct and a conspiracy on the part of Barnett's wife, McGugin, Mott and others to get for themselves a large part of Barnett's property. The second amended complaint omitted the allegations of fraud and conspiracy. The court below held that the tendered pleading did not state any ground for relief and denied the request to file it. This appeal was then taken, the error assigned being the refusal of the court to permit the second amended complaint to be filed. The theory of the suit, disclosed in the tendered pleading, is that the Secretary of the Interior exceeded his power in delivering the bonds, that he was fully advised of the whole plan and purpose of McGugin, et al., and the distribution of the bonds to be made after delivery, and that because thereof the bonds are still the property of Barnett.

The Act of May 27, 1908 (35 Stat. 312), treats of allotments to members of the Five Civilized Tribes, restrictions on disposition by the allottees and the power of the Secretary of the Interior in relation thereto. Section one of the Act provides, among other things, "and all allotted lands of enrolled full bloods * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-six, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe." Section 2, in part: "That leases of restricted lands for oil, gas, or other mineral purposes, * * * may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." Section 5: "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real

estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this act shall be absolutely null and void." These provisions of the Act established Barnett's legal incompetency to manage his own affairs, and so we need give no consideration to the allegations that he was in fact mentally incompetent. Congress, in the exercise of undoubted power, provided in this Act that the Government should control and preserve Barnett's property. This protecting care included not only his allotment but also the [fol. 71] income therefrom. Sunderland v. United States, 266 U. S. 226; United States v. Brown, 8 F. (2d) 564. The United States, through its Secretary, took the royalties for mineral produced from his allotment, as his guardian, and held them and the bonds purchased with them in trust for him. Assuming the Secretary had power to remove restrictions on Barnett's disposition of the bonds, as he had to remove restrictions on disposition of his allottment; still the Act further provided that disposal of the proceeds, in event restrictions were removed, should be for Barnett's benefit. The duty of the Secretary, then, did not cease with removing restrictions and thus permitting disposal, but he was also charged with the further duty and authority in the same transaction of seeing that disposal should be made for his benefit. Manifestly, it is the intention of the Act to safeguard at all times the property of full-bloods, whether allotments or proceeds therefrom, for their benefit. The bonds were Barnett's property and the Secretary, as Government agent, had the power and was charged with the duty of holding control over their disposition for the benefit of Barnett, and for no one else. He had no right to dispose of them as gifts or donations nor consent to such disposal. Of course, no one would argue that reasonable sums for those purposes might not be disbursed with the Secretary's consent, and likewise amounts from time to time for Barnett's proper maintenance. But that is not this case. The statute is an assurance of protection against spoliation. The Secretary's duty and power are not complied with by simply removing restrictions on alienation to a large part, probably here the far greater part, of the ward's estate; as part thereof it is

further required of him that he agree to the terms of sale and the disposal of the proceeds. He is given no authority to turn over the property or its proceeds to the Indian, nor consent that others might take to themselves the whole or a large part of it. Nor do we know of any authority in him to surrender the trust in which these bonds were held by the Government and consent to their deposit with others as trustees on terms that took from Barnett all property right in the principal and denied to him their full interest yield. As to the $350,000 given to Mrs. Barnett, she could on delivery make disposition as she might wish, and she at once did so to the extent of almost half. In Barnett v. Equitable Trust Co., 21 F. (2d) 325, Judge Knox ordered that the $550,000 in bonds held by the trust company be returned to the Secretary of the Interior. It may be conceded that if under facts in a given case it should be debatable whether action of the Secretary was for the benefit of the allottee, his judgment [fol. 72] and action ought to control; but we are unable to see any ground on which a claim may be made that the disposition of any of these bonds was for the benefit of Barnett, within the meaning and requirement of the statute. It seems clear to us that the statute is obligatory in that respect, and that the Secretary had no right to consent to the transaction. He had the power and was charged with the duty of preventing it. And so we conclude there was arbitrary and unauthorized action by the Secretary violative of the trust, with full knowledge on the part of all participants.

Where an executive officer, under his misconstruction of the law, has acted without or beyond the powers given him, the courts have jurisdiction to restore the status quo ante insofar as that may be done. Garfield v. Goldsby, 211 U. S. 249, 261, 262; Work v. Louisiana, 269 U. S. 250, 254; Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197, 199; Payne v. Central Pacific Ry Co., 255 U. S. 228, 238; Williamson v. United States, 207 U. S. 425, 462; Hemmer v. United States, 204 Fed. 898, 905; Leecy v. United States, 190 Fed. 289, 292.

The decree of dismissal is reversed with directions to reinstate the suit, permit appellant to file its tendered second amended complaint and give appellee reasonable time within which to file answer.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

DECREE—Filed Feb. 3, 1930.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to said District Court with directions to reinstate the suit, permit appellant to file its tendered second amended complaint and give appellee reasonable time within which to file answer; and that United States of America, appellant, have and recover against Marshall L. Mott, appellee, its costs herein and have execution therefor as at law.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS

MANDATE

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of Oklahoma, Greeting:

Whereas, lately in the District Court of the United States for the Northern District of Oklahoma, before you, or some of you in a cause between United States of America, Plaintiff, and Marshall L. Mott, Defendant, No. 343 Equity, the decree of the said District Court, in said cause, entered on May 16, 1929, was in the following words, viz:

"Now, therefore, in accordance with said finding and conclusion aforesaid, it is by the court ordered, adjudged and decreed that said application of the United States for leave to file its said second amended bill of complaint, as shown by copy thereof attached to the said application, be and the same is hereby denied, and this cause is dismissed, to which findings, conclusion, orders, judgment and decree the complainant, United States, by its said counsel at the time excepts and which exceptions are thereto allowed."

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Tenth Circuit, by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And Whereas, at the February Term, in the year of our Lord one thousand nine hunderd and thirty, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from said District Court and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause, be and the same is hereby reversed; that this cause be and the same is hereby remanded to said District Court with directions to reinstate the suit, permit appellant to file its tendered second amended complaint and give appellee reasonable time within which to file answer; and that United States of America, appellant, have and recover against Marshall L. Mott, appellee, its costs herein and have execution therefor as at law.

February 3, 1930.

[fol. 74] You, therefore, are hereby commanded that such further proceedings be had in said cause, not inconsistent with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles E. Hughes, Chief Justice of the United States, the 12th day of March, in the year of our Lord one thousand nine hundred and thirty.

Costs of Appellant

Clerk	$29.45
Printing Record	
Attorney	20.00
	$49.45

Albert Trego, Clerk of the United States Circuit Court of Appeals, Tenth Circuit.

In United States Circuit Court of Appeals

In Praecipe for Transcript on Appeal

To the Clerk of the Circuit Court of Appeals:

Prepare and have printed at least fourteen (14) copies of the proce-dings in said cause in your court including the

opinion and decree herein, with proper certificates attached thereto, and cause the same to be properly titled, indexed and paged and added to and bound with fourteen (14) copies of the transcript of record filed in your court in said cause, two of which fourteen copies are transmitted by me today for use with 12 copies which your office will furnish, said record when completed to be transmitted to me at Tulsa, Oklahoma. Proof of service of a copy of this praecipe on Government counsel is attached hereto.

Edwin S. Booth, Chas. B. Rogers, Attorneys for Marshall L. Mott, Appellee.

The United States of America, through Louis N. Stivers, Assistant United States District Attorney for the Northern District of Oklahoma, hereby acknowledges service of a true copy of the above praecipe for record on appeal by [fol. 75] delivery to said attorney of such copy, this 19th day of March, 1930.

Louis N. Stivers, W. B. Blair, Assistant United States District Attorney.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] Order Allowing Certiorari—Filed May 19, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,941. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 78. Marshall L. Mott, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed April 11, 1930. File No. 34,941.

FILE COPY

FILED
AUG 2 1930
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 78

In the Supreme Court of the United States

October Term, 1929.

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

Motion to Advance Said Cause for Hearing.

CHAS. B. ROGERS,
Attorney for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 810

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MOTION TO ADVANCE SAID CAUSE FOR HEARING.

Comes now Marshall L. Mott, petitioner, and moves the court herein to advance this cause for argument and submission immediately following cause No. 530, *United States of America* v. *Equitable Trust Company, et al.*, and that said causes be considered together.

This motion is based upon the fact that cause No. 530, aforesaid, involves a question of the authority and propriety of the District Court in entering an order therein awarding to Bailey, next friend, and his counsel, compensation

and attorneys' fees aggregating approximately $190,000.00 out of the funds described in the original action as "restricted moneys of Jackson Barnett." The determination of this issue involves a determination by this court of whether or not the Secretary of the Interior had authority and discretionary power to approve a written request of said Indian to transfer to said trust company said funds under a stipulation wherein Jackson Barnett donated $550,000.00 to the American Baptist Home Mission Society, to be placed in trust, the income from which during his life was to be paid, to the extent of $20,000.00 per year, to the Superintendent of the Five Civilized Tribes, for the use and benefit of said Indian.

That the case at bar involves the question of the authority and discretionary power of the Secretary of the Interior to approve a written request of said Jackson Barnett to transfer and deliver to Anna Laura Barnett, the lawful wife of Jackson Barnett, the sum of $550,000.00, to be her unrestricted property coupled with a promise on the part of said wife to immediately place in trust $200,000.00 of said funds, the income from which during his life, to the extent of $7500.00 per annum, was to be paid direct to said Jackson Barnett.

That the written request above referred to and the action thereon by the Secretary, in both instances, was on single transaction consummated at the same time.

Respectfully submitted,

CHAS. B. ROGERS,
Attorney for Petitioner.

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FILED
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CHARLES ELMORE CROPLEY
Clerk

No. [redacted] 78

In the Supreme Court of the United States

October Term, 1929.

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION OF MARSHALL L. MOTT FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHAS B. ROGERS,
Attorney for Petitioner.

INDEX.

	PAGE
PETITION FOR WRIT	1
Questions Presented	2
Statement of the Case	3
Statement of facts alleged in second amended bill	6
Specifications of error to be urged	9
Reasons for granting the writ	10
BRIEF SUPPORTING PETITION	13
Opinions of courts below	13
Jurisdiction	13
Statement	13
Statutes and regulations of Secretary of Interior involved	13
ARGUMENT	17
It is settled that under said Act (1908) the restricted land, and the income derived therefrom in the form of royalties taken under oil leases, are impressed with the same trust character in the hands of and under the control of the Secretary of the Interior	17
The Secretary likewise had authority under the regulations to release the funds derived from the royalties under the lease, and dispose of them in accordance with the request of the Indian in the absence of any charge of fraud or arbitrary action	18
Did the Secretary have the authority to approve the request of Barnett to transfer to his wife a portion of his bonds as a gift *inter vivos*, a portion of which bonds was to be placed in trust during the life of Barnett, the income to the extent of $7500.00 per year to be paid to him?	21
The power of Congress over the Indians is plenary and political, and the exercise of that power is not subject to be controlled by the judicial branch of the Government, and the exercise by the Secretary of the Interior and the Commissioner of Indian Affairs, of an authority, duly delegated by the Congress, is likewise free from judicial control	24
The exercise of discretion and judgment by an executive officer authorized to act, if honestly made, cannot be reviewed upon any issue of fact, without regard to whether said decision is right or wrong in the opinion of other men	26
In the absence of fraud, the exercise by a public official of an authority delegated to him by Congress cannot be reviewed by the courts, unless specially authorized by law so to do, and the official acts of such officer are presumed to be regular and he will be presumed to have properly discharged his duty, and the validity of the reasons upon which his judgment and act rests cannot be reviewed by the courts	25
Approval of Barnett's request by the Secretary, a removal of restrictions upon the funds	30
Discretionary judgment to control amendments	31
APPENDIX	33
"A"—Letter, Attorney General Sargeant to Secretary Work, with memorandum of Attorney General	33
"B"—Extract from opinion of Attorney General as to Restrictions on trust funds	41
"C"—Extract from opinion of solicitor for Interior Department regarding same matter	41

AUTHORITIES CITED.

	PAGES
Act of March 1, 1901 (31 Stat. 861)	17
Act of June 30, 1902 (32 Stat. 500)	17
Act of April 26, 1906 (34 Stat. 137)	17
Act of May 27, 1908 (35 Stat. 312)	2, 6, 9, 10, 13, 15, 17
Barnett, et al., vs. Barnett, et al., 121 Okl. 142	25
Bridgeman vs. United States, 140 U. S. 577	22
Bruno vs. Getzelman, (Okla.) 118 Pac. 850	30
Chapman vs. Barney, 129 U. S. 677, 32 L. ed. 800	31
Cherokee Nation vs. United States, 5 Pet. 1	22
Confiscation Cases, 20 Wall. 92-108	26
Dagnett vs. Jenks, (Kan.) 54 Pac. 136	30
Dakota Central Tel. Co. vs. South Dakota, 250 U. S. 163	26
Decambra vs. Rogers, 189 U. S. 119	25
Gormley vs. Bunyan, 138 U. S. 623, 34 L. ed. 1087	31
Hardin vs. Boyd, 113 U. S. 756, 28 L. ed. 1141	31
Heckman vs. United States, 56 L. ed. 820	22, 24
In re Appeal of Jackson Barnett, 122 Okl. 166	25
Jennings vs. Wood, 192 Fed. 507	27, 28
Kendall vs. Ewert, 259 U. S. 137, 42 S. Ct. 444, 66 L. ed. 862	27, 28
Lone Wolf vs. Hitchcock, 47 L. ed. 299	24
Mandeville & Jamesson vs. Wilson, 5 Cranch. 13, 3 L. ed. 23	31
Parker vs. Richard, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954	17, 18, 19, 22, 24
Rainbow vs. Young, 161 Fed. 835	22
Rules and Regulations of Secretary of Interior, chap. 24	14
Silberschein vs. United States, 267 U. S. 222	26
Sperry Oil & Gas Co. vs. Chisholm, et al., 264 U. S. 486, 68 L. ed. 803	25
United States vs. Brown, 8 Fed. (2d) 564-567	17
United States vs. Caster, 271 Pac. 619	30
United States vs. Chemical Foundation, Inc., 71 L. ed. 131	25, 26
United States vs. DeBell, 27 Fed. 760	30
United States vs. Equitable Tr. Co., et al., (pending U. S. Sup. Ct.)	11
United States, ex rel. Riverside Oil Co., vs. Hitchcock, 190 U. S. 316	25
United States, ex rel. West, vs. Hitchcock, 205 U. S. 80, 51 L. ed. 718	22
United States vs. John Hinkle, 261 Fed. 518	18, 20, 22, 24
United States vs. Mathewson, 32 Fed. (2d) 745	30
United States vs. McDaniel, 7 Pet. 1, 8 L. ed. 587	23
United States vs. McGugin, et al., 28 Fed. (2d) 76-78	18
United States vs. Page, 137 U. S. 673	26
United States vs. Richards, 188 U. S. 482, 461 L. ed. 532	24
United States vs. Thurston County, 60 L. ed. 1192	25
Williams vs. United States, 138 U. S. 514, 34 L. ed. 1026	22

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. ____

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION OF MARSHALL L. MOTT FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, Marshall L. Mott, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, entered in the above entitled cause on the 3rd day of February, 1930 (R. 72), reversing the decree of the District Court of the United States for the Northern District of Oklahoma, entered by said court on May 16th, 1929 (R. 57-59), and remanding said cause to the lower court with instructions to permit the United States to file said second amended bill of complaint and to grant to the defendant Mott time in which to make his answer thereto (R. 72).

Questions Presented.

Questions presented in this case are:

1. Has the Secretary of the Interior under the provisions of the Act of May 27, 1908, sections 1 and 2 (35 Stat. 312), and the rules and regulations by him promulgated relative to the execution and approval of oil and gas leases upon the restricted lands of an adult full-blood Creek Indian, power and authority to unconditionally release a portion of the royalty fund derived from said lease, held by him under the rules and regulations aforesaid, and transfer the same in accordance with the request of said Indian?

2. Has the Secretary of the Interior, holding funds derived from royalty under an oil and gas mining lease, executed and approved under the provisions of the act aforesaid (May 27, 1908, Secs. 1 and 2, 35 Stat. 312), and in accordance with amended section 24 of the regulations of said Secretary theretofore duly promulgated, which amended section provides:

> "* * * that in such individual case or class of cases as the Secretary of the Interior may direct, the Superintendent of the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties, and other individual funds of the restricted Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in such case."

Section 8 of which lease provides:

> "This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force,

relative to such leases, all of which regulations are made a part and condition of this lease; * * *"

power and authority to distribute a portion thereof as a gift *inter vivos* to the lawful wife of said adult restricted full-blood Creek Indian, in accordance with the written request of such Indian?

3. Is the disbursement by the Secretary of the Interior of a portion of such trust fund, in accordance with the written request of such adult restricted full-blood Indian to make a gift *inter vivos* to his lawful wife, in the absence of fraud on the part of or deception practiced upon said official, subject to judicial review by the courts?

4. Is the authority and discretionary power of the Secretary of the Interior in the disposal of the trust funds belonging to an adult, restricted, full-blood Creek Indian, who is neither insane nor an idiot, derived from royalties under an oil and gas mining lease, executed by the Indian and approved by the Secretary under the provisions of sections 1 and 2 of the Act of May 27, 1908 (35 Stat. 312), and in accordance with the rules and regulations of the Secretary, duly promulgated with reference thereto, and especially amended section 24 aforesaid, *limited, restricted* or *qualified* by the degree of mental capacity of the Indian owner of the funds?

Statement of the Case.

Proceeding: This suit was instituted in the United States District Court for the Northern District of Oklahoma by the United States against Marshall L. Mott, as de-

fendant, to recover and have returned to the United States, to be placed in the Department of the Interior, Fifteen Thousand Dollars value of United States bonds, formerly under control of the Secretary of the Interior as restricted funds of Jackson Barnett, an enrolled, adult full-blood, restricted Creek Indian, and to recover interest collected thereon, and for an accounting from the defendant; and, if said bonds cannot be recovered, then for the value thereof.

The original bill of complaint (not in the record) was based upon the theory and attempted to charge fraud in the transactions involved upon the part of the officials of the Interior Department.

The United States filed its first amended complaint (R. 1-34), which was based upon an alleged fraudulent combination and scheme to defraud Barnett of his wealth and estate and to defraud the United States. The bill alleged in the alternative that either the Secretary was deceived by false representations in the official recommendation of the gifts or that he (the Secretary) was himself a party to the plan and scheme, and participated therein.

A motion and supplemental motion to dismiss the amended bill of complaint was filed by the defendant Mott (R. 34-43).

Pending the hearing of said motion and supplemental motion to dismiss, the Department of Justice abandoned its position and concluded that allegations of fraud or imposition upon or collusion with or deception of government officers or of the United States could not be established.

Thereafter, and while said motions to dismiss were pending, the United States filed its application for leave to file a second amended bill of complaint. (R. 44-53).

Thereafter defendant Mott filed his response to the application for leave to file a second amended complaint by the United States, in the nature of objections to the granting of the application of the government (R. 53-54).

Thereafter, the matter coming on for hearing before Hon. JOHN C. POLLOCK, United States District Judge, on the motions to dismiss the amended bill of complaint, the application of the government to file its proposed second amended complaint and the objections of defendant Mott to said application of the government, the court announced its opinion and decision (R. 55-57) denying the government's application to file said second amended complaint on the ground that the facts therein stated were insufficient to constitute a valid cause of action or to entitled the government to the relief prayed for, and treating the government's application as confessing the motion to dismiss the first amended bill of complaint, and the court thereupon denied the motion and application of the government for leave to file the second amended complaint and dismissing said action and thereafter on May 16, 1929, entered its order and decree in accordance with its opinion (R. 57-58).

Within due time and upon exceptions taken by the government, appeal was duly perfected and taken (R. 59-62) to the Circuit Court of Appeals for the Tenth Circuit, and the Court of Appeals rendered its judgment and decree

reversing the judgment and decree of the United States District Court for the Northern District of Oklahoma, which was entered on February 3, 1929 (R. 72).

Statement of Facts Alleged in Second Amended Bill.

The facts alleged (R. 46-53) are:

That Jackson Barnett was an adult, enrolled, full-blood member of the Creek Tribe of Indians, one of the Five Civilized Tribes, about 78 years of age, and was allotted and owned lands in said nation in fee, subject only to restrictions against alienation thereof prior to April 26, 1931, and upon which lands in 1912, an oil and gas mining lease (R. 47) was duly executed and approved by the Secretary of the Interior under the provisions of sections 1 and 2 of the Act of May 27, 1908 (35 Stat. 312), pursuant to the regulations promulgated by the Secretary of the Interior relative thereto as authorized by said act.

That royalties provided for in said lease had up to February 1st, 1923, accumulated in the hands of the Superintendent of the Five Civilized Tribes to the credit of Jackson Barnett, and subject to the control of the Secretary of the Interior, in the sum of $1,156,750.00.

That Jackson Barnett is alleged to be a mental incompetent, illiterate and incapable of managing his affairs and caring for his property and person and to understand the nature and extent of his property, and by reason of his mental infirmity he was unable to realize or understand the portions of his property which he requested to be transferred to his wife as a gift *inter vivos*.

That on February 1, 1923, the Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs and upon the written request of Jackson Barnett, transferred and delivered to A. J. Ward, Creek Tribal Attorney, for the use and benefit of the American Baptist Home Mission Society, in trust, to be delivered to the Equitable Trust Company of New York, as trustee, $550,000.00 face value of bonds, and from the income of which trust fund twenty thousand dollars per year was to be paid to the Superintendent of the Five Civilized Tribes for the use of said Barnett, during his lifetime; and at the same time and as a part of the same transaction, and upon the written request of Jackson Barnett said Secretary delivered to and into the hands of Anna Laura Barnett, wife of said Barnett, United States bonds of the par value of five hundred and fifty thousand dollars, two hundred thousand dollars of which Anna Laura Barnett, his wife, agreed would be placed in a trust with the Riggs National Bank as trustee, which was done, to remain during the life of Jackson Barnett, providing for the payment to *him* personally, from the income thereof, of seven thousand five hundred dollars annually during his lifetime, and the remainder of which bonds, to-wit, three hundred and fifty thousand dollars, were to become the sole, free and unrestricted property of his said wife.

That the County Court of Okmulgee County in 1912 appointed a guardian for Jackson Barnett as an incompetent person, which guardian assumed and was on February 1, 1923, assuming to exercize his office, which fact was set forth in the letter of recommendation signed by A. J. Ward,

addressed to the Secretary of the Interior, although it is further alleged that subsequently the Supreme Court of Oklahoma rendered its opinion holding the appointment of said guardian of Barnett void from its inception.

That the action of the Secretary of the Interior in disbursing said funds was based upon the written request of Jackson Barnett (see copy attached to first amended bill, R. 22-25) together with a letter from the Creek national attorney (see R. 25-33) recommending the approval of said request, and a letter from the Commisioner of Indian Affairs containing a recommendation that the Secretary approve said request, all of which instruments were transmitted to the Secretary for his consideration and approval, and that they were so approved and the distribution of said bonds made in accordance therewith, which said recommendation of the Commissioner of Indian Affairs was stamped approved over the signature of the Secretary of the Interior (see R. 50).

Alleging that the delivery of said bonds was made without the knowledge or consent of said guardian or of the County Court of Okmulgee County, Oklahoma, and that the delivery and distribution of said bonds was not for the benefit of said Barnett, and that the delivery of said bonds was made by the Secretary of the Interior without warrant or authority of law (R. 50).

That upon delivery of said bonds to Anna Laura Barnett, wife, she delivered fifteen thousand dollars of the bonds so received to the defendant, Marshall L. Mott, who, it is alleged, had actual knowledge of all the facts as to the

delivery of said bonds to Anna Laura Barnett, and that said bonds had prior thereto been the property of Jackson Barnett, and that said defendant Mott knew said Barnett was a mental incompetent and said funds were trust funds under the jurisdiction of the Secretary of the Interior.

Specifications of Error to Be Urged.

The Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the Secretary of the Interior had no right to dispose of a portion of the restricted trust funds of Barnett, in accordance with written request of Barnett, as a gift *inter vivos* to Anna Laura Barnett, his lawful wife, and that the approval of the Secretary of such disbursement of a portion of his trust funds was without authority of law (R. 71).

2. In holding that the Secretary of the Interior was without authority, under the Act of May 27, 1908 (35 Stat. 312), to unconditionally remove restrictions from trust funds and to release said funds, wholly or in part, to either Barnett or in accordance with Barnett's request (R. 71).

3. In holding that after removal of restrictions by the Secretary, wholly or in part, upon the trust funds and at the request of Barnett, the Secretary of the Interior was under the act, *supra*, required to see that such funds are disbursed "for the benefit of the Indian," and "that he (the Secretary) agree to the disposal thereof" (R. 71).

4. In holding that the exercise by the Secretary of his discretion and judgment as to what portion of Barnett's

trust funds might be disposed of as gifts to his wife, was subject to judicial review.

5. In holding that the action by the Secretary in the approval of Barnett's request, and the transfer of the bonds to Barnett's wife as a gift *inter vivos*, was an arbitrary and unwarranted act (R. 72).

6. In refusing to hold that the acts of the Secretary of the Interior, in the exercise of his discretion and judgment, in the approval of the request of Jackson Barnett for the transfer of said bonds, as a gift *inter vivos* to his wife in the sum of five hundred and fifty thousand dollars, in the absence of any charge of fraud against said official or those charged with the administration of Indian affairs, or any charge of deception practiced upon the Commissioner of Indian Affairs or the Secretary of the Interior as to the facts, was a valid exercise by the Secretary of his discretion and judgment as to the disposal of said funds for the benefit of said Indian, and is not subject to review.

Reasons for Granting the Writ.

In this case a question of federal law construing the Act of May 27, 1908, has been decided, which is in direct conflict with the unanimous opinion of this court in numerous cases, holding that the judgment of the Secretary, free from fraud or deception, unless arbitrarily exercised, is not reviewable by the courts. The opinion of the Circuit Court of Appeals, if allowed to remain the law, makes reviewable in the courts all cases wherein the Secretary of the Interior has removed restrictions from alienation of either land or

trust funds arising therefrom, especially of the Five Civilized Tribes, which is destructive of the heretofore recognized policy of the government in Indian affairs, and of public concern to the holders of titles to Indian lands. The rule announced in the decision is the first pronouncement by a Circuit Court of Appeals questioning the discretionary power of the Secretary of the Interior to supervise the collection, care and disbursement of royalties derived from restricted Indian lands, under leases provided for by Act of May 27, 1908, and to commit to the courts matters pertaining to such lease or the disbursement of such royalties. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals of the Second Circuit, 34 Fed. (2d) 916, and of two United States district judges (see 33 Fed. (2d) 340), touching the power of the Secretary on this identical transaction.

There is now pending in this court cause No. 530, entitled *United States of America* v. *Equitable Trust Company of New York, et al.*, wherein the court will consider at least a portion of the issues involved touching the authority of the Secretary of the Interior, with reference to the transfer to the Equitable Trust Company, as trustee, of five hundred and fifty thousand dollars, approved by the Secretary of the Interior, of the moneys of Jackson Barnett, as referred to in the statement of facts in this cause (R. 48). The cause on appeal by the government as appellant, of necessity affects in part the instant case, and this writ should be granted that the court may have fully and fairly presented the entire issues upon a consolidation

of both cases, which will enable the court to give consideration to the questions involved and settle by its pronouncement the law applicable to all of the Barnett litigation pending now in five different federal courts.

Wherefore, it is respectfully requested that this petition for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit be granted.

CHAS. B. ROGERS,
Attorney for Petitioner.

BRIEF SUPPORTING PETITION.

Opinions of Courts Below.

The opinion of the United States District Court for the Northern District of Oklahoma herein was rendered on the 16th day of May, 1929 (R. 57-59), and is reported in 33 Fed. (2d) 340.

The opinion of Circuit Court of Appeals in said cause was filed January 27, 1930, and no petition for rehearing was filed, and a copy of said opinion is found herein (R. 68-72).

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 3, 1930 (R. 72).

Jurisdiction of this court is invoked under Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

Statement.

A statement of the questions involved, and of facts charged and issues raised by the proffered second amended bill of the United States and of the errors assigned will be found in the petition.

Statutes and Regulations of Secretary of Interior Involved.

The pertinent provisions of the Act of May 27, 1908, Chapt. 199 (35 Stat. 312), are as follows:

"*Sec. 1.* * * * All allotted lands of full-bloods * * * including minors of such degrees of blood shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April twenty-six, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove restrictions, wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds, for the benefit of the respective Indians as he may prescribe.

"*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent, for a period of not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; * * *".

Chapter 24 of Rules and Regulations of the Secretary of Interior, concerning the collection, control and disbursement of the royalties and income under leases upon restricted lands of Indians, referred to in sections 1 and 2 of the Act of May 27, 1908, aforesaid (Amended Regulations), provides:

"* * * And *provided further,* that in such individual case or class of cases as the Secretary of the Interior may direct, the Superintendent of the Five Civilized Tribes shall cause such payment as may be

authorized to be made out of the royalties and other individual funds of the restricted Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in such cases."

Paragraph 8 of the oil lease of Jackson Barnett, executed under the Rules and Regulations for such, duly promulgated by the Secretary of the Interior, reads as follows:

"This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; *provided, however,* that no regulations made after approval of this lease affecting either the rights of royalty, or payment thereunder, shall operate to affect the terms and conditions of this lease."

The outstanding questions presented by the petition are:

1. Whether the Secretary of the Interior, under said act (May 27, 1908), may unconditionally remove restrictions from the land, or the income derived therefrom held by him under such act and the regulations by him promulgated, and release control and responsibility therefor?

2. Whether the Secretary of the Interior, under the provisions of Act of May 27, 1908, Secs. 1 and 2, Chapt. 199 (35 Stat. 312), can lawfully approve the request of an adult full-blood member of the Creek tribe of Indians to make a gift *inter vivos* to his lawful wife of a portion of his restricted moneys in the hands of said Secretary—derived from royalties under an oil and gas lease, executed by said

Indian on his restricted lands, under the provisions of said act and in accordance with rules and regulations promulgated by the Secretary for such purpose, and providing for the collection, care and disbursement of the proceeds derived from said lease as royalties, and whether said Secretary may lawfully transfer to said wife said fund upon request of said Indian?

3. Whether the discretionary judgment of the Secretary in the disposal of said fund in accordance with the request of said Indian, and free from any charge of fraud on the part of or deception of said officer, is subject to be reviewed and controlled by the courts?

4. Whether the degree of mental competence or incompetence of such restricted Indian, making such request of the Secretary, for the disposal of a portion of his restricted moneys to his wife as a gift, limits, restricts or modifies the authority and power of the Secretary in that behalf?

ARGUMENT.

I.

It is settled that under said Act (1908) the restricted land, and the income derived therefrom in the form of royalties taken under oil leases, are impressed with the same trust character in the hands of and under the control of the Secretary of the Interior.

United States v. *Brown*, 8 Fed. (2d) 564-567, considering the provisions of Act of May 27, 1908, *supra*, said:

> "The act does in terms, however, authorize the making of these leases subject to the approval of the Secretary of the Interior. It must be conceded that the royalties accruing therefrom are lodged with the officers of that department impressed with the same trust as are the lands themselves. *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529; *United States* v. *Hinkle*, (C. C. A.) 261 Fed. 518; *United States* v. *Moore*, (C. C. A.) 284 Fed. 86."

See also,

Parker v. *Richard*, 250 U. S. 235.

Under the provisions of the Act of March 1, 1901, Original Creek Agreement, Sec. 7 (31 Stat. 861), and Act of June 30, 1902, Supplemental Creek Agreement, Sec. 16 (32 Stat. 500), and the provisions of Act of April 26, 1906 (34 Stat. 137), and the Act of May 27, 1908, Secs. 1 and 2 (35 Stat. 312), *supra*, the Secretary of the Interior had authority to remove the restrictions upon the alienation of Jackson Barnett's allotment.

The power of the Secretary to remove restrictions from the lands of Jackson Barnett, under the law has never been denied.

The validity of the oil lease, executed by this Indian upon his restricted land, is confessed in the bill by the allegation of its execution and approval by the Secretary under said regulations, and the resultant accumulation of royalties thereunder.

The Secretary likewise had authority under the regulations to release the funds derived from the royalties under the lease, and dispose of them in accordance with the request of the Indian in the absence of any charge of fraud or arbitrary action.

—*United States* v. *John Hinkle*, 261 Fed. 518;
United States v. *McGugin, et al.*, 28 Fed. (2d) 76-78, with authorities cited;
Parker v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954.

See also opinion of attorney general of October 20, 1926, promulgated by said official for guidance of Department of Justice in the litigation in the various courts, concerning Jackson Barnett's property and affecting this identical transaction. A full copy of that opinion is attached hereto as "Appendix A."

See also extract from opinion of attorney general, dated October 5, 1929, concerning the power and authority of the Secretary of the Interior *to unconditionally remove restrictions from trust funds belonging to individual Indians*, attached hereto as "Appendix B;" also extract from

opinion of solicitor for Interior Department, dated June 26, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians, attached as "Appendix C."

In his opinion of October 20th, 1926, *supra;* the attorney general states two major propositions of law—after asserting that the Secretary did have the authority to approve the lease of Barnett, subject to his regulations *(supra):*

(a) That the Indian, when he executed the lease, gave his consent in advance for the collection, care and disbursement of the royalties by the Secretary, in accordance with said regulations.

(b) That Congress invested the Secretary with power to create said regulations and to determine their necessity, and their effectiveness for the purpose for which they were created—and that Congress saw fit to accomplish its purpose of protection of the Indian—and vested the administration and control in the Secretary of the Interior without specific limitation of the manner in which he might administer, "hence the power so conferred is broader than powers which might have been specifically conferred."

This court, through Justice VAN DEVANTER, in *Parker v. Richard, supra,* construing sections 1 and 2 of Act of May 27, 1908, said:

> "Under the Act of 1908, as already shown, leases of 'restricted land' for oil and gas mining, may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not oth-

erwise.' The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus, the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior *of the collection, care and disbursement of the royalties has not occurred.* * * *

"In the absence of some provision to the contrary, the supervision naturally falls to the Secretary of the Interior. Rev. Stat. 441-463; *United States, ex rel.*, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 721, * * * and see *Catholic* v. *Gibbon*, 158 U. S. 155, 156, 39 L. ed. 931, 936, * * *."

(Reference is then made to the provision for a sale by the heirs subject to the approval of the state court.)

Then the opinion further says:

"There is nothing in the proviso indicating that it is intended in the meantime *to take from the Secretary or to commit to the court* the supervision of matter pertaining to the lease or the royalties. A purpose to do that doubtless will be plainly expressed."

In *United States* v. *Hinkle, supra*, the Eighth Circuit Court of Appeals, construing this same statute, says:

"We are of the opinion, however, that under sections 19 and 20 of the Act of April 26, 1906, and section 2 of the Act of May 27, 1908, and the regulations of the Secretary of the Interior promulgated July 7th, 1906, June 11th, 1907, and April 20th, 1908; the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes, is vested in the Secretary of the Interior, *subject only to such rules and*

regulations as he may prescribe, as an independent trust fund, separate and distinct from the trust estate in the land itself, and the rules and regulations referred to show that the Secretary has elected to administer this trust, and to retain the custody and control of such funds, 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs,' nor did the approval of the County Court affect the matter of mineral rents and profits, as that was a matter beyond his jurisdiction."

II.

Did the Secretary have the authority to approve the request of Barnett to transfer to his wife a portion of his bonds as a gift *inter vivos,* a portion of which bonds was to be placed in trust during the life of Barnett, the income to the extent of $7500.00 per year to be paid to him?

In the absence of any charge of fraud on the part of the officials having to do therewith, it was within the discretionary power of the Secretary, upon the recommendation of the Commissioner of Indian Affairs, to approve said request of Barnett, and to lawfully transfer to Barnett's wife such portion of his bonds, (which, according to the petition, was less than half of his then accumulated bonds and moneys, to say nothing of his lands, which were then (1923) producing over $100,000.00 per year income) a large portion of which bonds were to be by her placed in trust for the use of Barnett during his life.

The determination of what disposition of said funds was "for the benefit of the Indian," was a matter for the Secretary to determine.

See opinion of attorney general, October 20, 1926 (appendix "A" hereto.)

—*Rainbow* v. *Young*, 161 Fed. 835;
Heckman v. *United States*, 56 L. ed. 820;
United States v. *John Hinkle*, *supra*;
Parker v. *Richard*, *supra*.

This authority may be exercised in the absence of specific express authority of Congress.

—*Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026;
United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 587;
Cherokee Nation v. *United States*, 5 Pet. 1;
Parker v. *Richard*, *supra*;
U. S. ex rel. West, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718.

The regulation (24 as amended by the order of October 7, 1922) has the force and effect of law.

—*Bridgeman* v. *United States*, 140 U. S. 577;
United States v. *John Hinkle*, *supra*;
West v. *Hitchcock*, *supra*;
Rainbow v. *Young*, *supra*.

Whether the request of Barnett to deliver to his wife a portion of his trust funds in the hands of the Secretary was for the interest or benefit of Barnett was a question fairly before the Secretary—he determined that in the manner set forth, free from fraud or arbitrary conduct on his part—and its approval was an exercise of his discretionary judgment.

It will be noted that the transfer to the wife of the funds, charged in the bill, was to be "free and unrestricted," except subject to her agreement to place $200,000.00 of the funds in trust during Barnett's life for his use (which was done).

The Circuit Court of Appeals held:

(a). That the Secretary could not unconditionally remove the restrictions from trust property (either land or funds), but must follow the same to see that the proceeds are used "for the benefit of the Indian" allottee.

(b) That the Secretary, under the provisions of law (Act of 1908) could not approve a request of an Indian to transfer a portion of his funds to his wife as a gift *inter vivos*.

Both of said conclusions above are in direct conflict with the cases cited under the foregoing topics discussed, and in direct conflict with the policy which has been uniformly followed by the Indian Department since 1908. Since 1908 many hundreds of cases, in the Five Civilized Tribes, of unconditional removal of restrictions upon the alienation of allotted Indian lands by the Secretary have been granted. Under the opinion of the Circuit Court of Appeals herein, the title to these lands, where conveyed by the Indian, becomes subject to investigation by courts to determine whether the sales thus made were advantageous to the Indian or otherwise, and will entail endless litigation.

Non-Indian citizens of independent character and freedom to act, have considered it a valuable privilege to be-

stow upon the lady who is to become his wife a generous *ante*-nuptial settlement, and likewise, in many cases, gifts *inter vivos* have been made by men to their wives of a liberal portion of their estates. Why this same privilege ceases to have virtue or to receive the commendation of society and the state when applied to a rich Indian whose estate happens to be under the jurisdiction of the Secretary of the Interior, we are unable to understand.

III.

The power of Congress over the Indians is plenary and political, and the exercise of that power is not subject to be controlled by the judicial branch of the Government, and the exercise by the Secretary of the Interior and the Commissioner of Indian Affairs, of an authority, duly delegated by the Congress, is likewise free from judicial control.

—*Lone Wolf* v. *Hitchcock*, 47 L. ed. 299;
United States v. *Richards*, 188 U. S. 432, 47 L. ed. 532;
Heckman v. *United States*, 56 L. ed. 820;
United States v. *Hinkle*, *supra*;
Parker v. *Richard*, 250 U. S. 235.

The last case above cited directly construed the provisions of the Act of May 27, 1908, as to the collection, care and disbursement of the royalties derived from a Creek restricted allotment.

The exercise by said officials of the authority to control the restricted lands and income aforesaid, is not affected by state laws—and the appointment by a state court of a

guardian over such restricted Indian does not affect the authority of the Secretary to control the restricted property.

—*Sperry Oil & Gas Co.* v. *Chisholm, et al.*, 264 U. S. 486, 68 L. ed. 803;

United States v. *Thurston County*, 60 L. ed. 1192;

In re Appeal of Jackson Barnett, 122 Okl. 166;

Opinion of Vice-Chief Justice BRANSON in *Barnett, et al.*, v. *Barnett, et al.*, 121 Okl. 142.

The lack of knowledge on the part of or the consent of the alleged guardian of Barnett or of the County Court having jurisdiction over said guardian, did not affect the validity of said transfer.

IV.

The exercise of discretion and judgment by an executive officer authorized to act, if honestly made, cannot be reviewed upon any issue of fact, without regard to whether said decision is right or wrong in the opinion of other men.

—*Decambra* v. *Rogers*, 189 U. S. 119;

United States, ex rel. Riverside Oil Co., v. *Hitchcock*, 190 U. S. 316;

United States v. *Chemical Foundation, Inc.*, 71 L. ed. 131.

In the absence of fraud, the exercise by a public official of an authority delegated to him by Congress cannot be reviewed by the courts, unless especially authorized by law so to do, and the official acts of such officer are presumed to be regular and he will be presumed to have properly dis-

charged his duty, and the validity of the reasons upon which his judgment and act rests cannot be reviewed by the courts.

—*Confiscation Cases,* 20 Wall. 92-108;
United States v. *Page,* 137 U. S. 673;
Dakota Central Tel. Co. v. *South Dakota,* 250 U. S. 163;
Silberschein v. *United States,* 267 U. S. 222;
United States v. *Chemical Foundation, Inc., supra.*

The proffered second amended bill alleges—that Jackson Barnett is approximately 78 years of age and without issue, and is now and was at the time of the making of the written request to the Secretary to transfer said property to his wife "unable to read or write any language, or to understand elementary arithmetic, or to readily comprehend the English language, nor by reason of his mental infirmity was he able to appreciate the nature or amount of his property, or to realize the portions of it so disposed of and distributed, nor was he, at the times complained of, able to understand, and at no time since has understood, the terms and conditions upon which the said delivery of said bonds was made by the Secretary of the Interior" (R. 49).

In its opinion the Circuit Court of Appeals, after referring to the provisions of sections 1 and 2 of the Act of May 27, 1908, says:

> "These provisions of the act establish Barnett's legal incompetency to manage his own affairs, and so we need give no consideration to the allegations that he was in fact mentally incompetent." (See opinion, R. 70.)

Later in said opinion said court used the following language:

> "In *Barnett* v. *Equitable Trust Co.*, 21 Fed. (2d) 325 (the case now before this court on appeal, No. 530), Judge KNOX ordered that $550,000.00 in bonds held by the trust company, be returned to the Secretary of the Interior." (R. 71)

Judge KNOX in his opinion decided that the transfer of the bonds by the Secretary to the Equitable Trust Company, on the written request of Barnett, was void, not because the Secretary had no authority to remove the restrictions which had been placed upon the property of Barnett, nor because of his lack of authority to approve such gifts and donations of his property as he in fact made, "but such approval, however honest and disinterested it may have been, cannot give validity to a gift or donation which the apparent donor did not make, and which by reason of mental incompetency he was incapable of making." Citing:

> *Jennings* v. *Wood*, 192 Fed. 507;
>
> *Kendall* v. *Ewert*, 259 U. S. 137, 42 S. Ct. 444, 66 L. ed. 862.

The theory of the attorney general on behalf of the government in its second amended bill is that the Secretary of the Interior's action, in transferring said trust funds, was unlawful because of the mental incompetency of the Indian to initiate the request to the Secretary to transfer a portion of his property to his wife, and in that behalf cited in its brief to the court Judge KNOX's decision as authority. The Department of Justice at no time has disputed the authority of the Secretary of the

Interior, under his regulations, to transfer the restricted moneys of an Indian to his lawful wife upon his request, subject to the qualification that the Indian had sufficient mental capacity, as indicated above, that is, to understand the English language and to appreciate the nature and amount of his property and to comprehend elementary arithmetic, and that portion of his property which he attempts to dispose of. Notwithstanding the declaration of the Circuit Court of Appeals that it need give no consideration to the allegations that Barnett was in fact mentally incompetent, the opinion reflects that the conclusion of the court, as to what was for the best interest of Barnett, was influenced by the allegation of mental incompetency, and by the decision of Judge KNOX, *supra*.

Judge KNOX, in his opinion in the New York case, said (see 21 Fed. (2d), p. 332):

> "While he (Barnett) is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. * * *
>
> "In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity."

Neither *Jennings* v. *Wood*, *supra*, nor *Kendall* v. *Ewert*, *supra*, are authority for the conclusions reached by Judge KNOX in the New York case.

The degree of mental capacity of the Indian, who is neither an idiot nor an insane person, certainly cannot limit, restrict or modify the lawful authority of the Secretary of

the Interior to dispose of or disburse the restricted funds derived from oil leases under his regulations aforesaid. What is said in the bill as to the mental capacity of Jackson Barnett, can be said of practically every one of the older full-blood Creek Indians, and a majority of the younger ones, all restricted alike, whether educated or uneducated, and all within what has always been classed as "Congressional Restrictions," without regard to their individual mental capacity.

It was, in every case where the Secretary exercised his discretionary judgment to remove the restrictions from the land, or to release the restricted moneys and disburse them upon the request of the Indian, a necessary element in the question before him, *to consider and determine the mental capacity of the Indian as to the wisdom or unwisdom of the request,* and it was no less an element in the determination of the question of removal of restrictions than the final judgment of the Secretary as to the wisdom of the act. The Indian's judgment as to what disposition of his money should be made, did not determine the action of the Secretary—it was the Secretary's judgment as to the wisdom and propriety of the act which controlled.

Barnett had sufficient mental capacity to execute a valid oil lease on his lands, and the execution of the lease was no less solemn or important in the law than the execution by him of a request to transfer a portion of his bonds to his wife. The lack of capacity to judge of the nature and effect or of the advantageous character of the lease to himself, was compensated for by the interposition of the judg-

ment and experience of the Secretary, and thus the lease, when approved, was for the best interest of the Indian, and likewise Barnett's lack of knowledge of the extent and value of his property and of the effect of his act in transferring to his wife a portion of his bonds, was equally compensated for by the interposition of the judgment and experience of the Secretary in that behalf, and his judgment is no less conclusive in the one case than the other. The determination whether it was for the best interest of the Indian involved a finding of fact.

Approval of Barnett's Request by the Secretary, a Removal of Restrictions Upon the Funds.

It has been repeatedly held by the courts of the United States and of various states where restricted Indians are located, that an approval of a deed by such Indian of his restricted land by the Secretary, where authorized by law, amounts to a specific removal of restrictions upon the sale of the land. The same principle would apply in the present case to the approval by the Secretary of the request of Jackson Barnett and the transfer to his wife of said bonds in accordance therewith, that is, this would amount to a specific order of the Secretary, releasing said moneys from restrictions.

—*United States* v. *Caster*, 271 Pac. 619;
United States v. *Mathewson*, 32 Fed. (2d) 745;
United States v. *DeBell*, 27 Fed. 760;
Dagnett v. *Jenks*, (Kan.) 54 Pac. 136;
Bruno v. *Getzelman*, (Okl.) 118 Pac. 850.

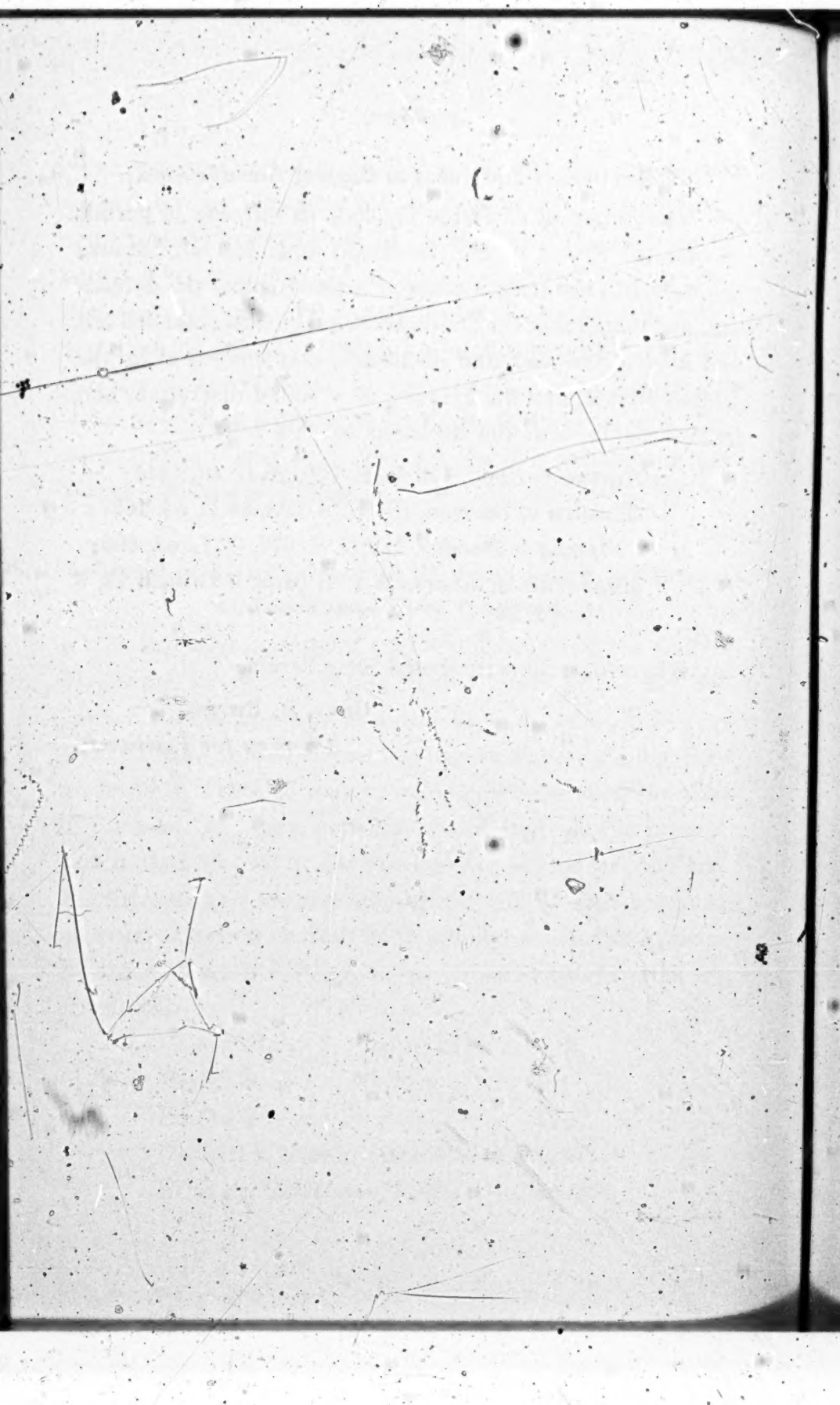
Discretionary Judgment to Control Amendments.

The judgment of Judge POLLOCK in refusing to permit the United States to file its second amended bill because the same did not state a cause of action against the defendant, and dismissing the action because the first amended bill had been abandoned, and its insufficiency confessed by the United States, was the exercise of a sound discretion, and in accordance with the decisions of this court.

—*Hardin* v. *Boyd*, 113 U. S. 756, 28 L. ed. 1141;
Gormley v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1087;
Chapman v. *Barney*, 129 U. S. 677, 32 L. ed. 800;
Mandeville & Jamesson v. *Wilson*, 5 Cranch 13, 3 L. ed. 23.

Wherefore, the writ should issue herein.

CHAS. B. ROGERS,
Attorney for Petitioner.



Appendix "A."

Interior Dept. Received Dec. 14, 1926. Office of the Secretary.

Department of Justice,
Office of the Attorney General.
Washington, D. C.

Hon. Hubert Work,
Secretary of the Interior,
Washington, D. C.

December 11, 1926.

My dear Mr. Secretary: In accordance with your informal request submitted through Assistant Secretary Edwards, there is enclosed herewith copy of the memorandum of October 20, 1926, prepared by Mr. George P. Barse of this department, referred to in a letter of October 22, 1926, sent by me to the United States Attorney in New York City in connection with a suit of *Jackson Barnett* v. *Equitable Trust Company, et al.* The view therein expressed with reference to the amendment of October 7, 1922, of the regulation of the Secretary of the Interior relating to the disposal of proceeds of oil and gas leases of restricted lands of members of the Five Civilized Tribes, is my present view. A copy of the letter of October 22, 1926, and also of a letter of a similar nature, of October 26, 1926, to the United States Attorney in New York, have already been furnished to you by my letter to you of October 26, 1926.

I am sending you by separate mail a reply to your letters of October 4 and November 3, 1926, requesting my opinion as to the authority of the Secretary of the Interior to disburse restricted funds of allottees of the Five Civilized Tribes in cases where guardians of incompetents have been appointed.

Respectfully,

Jno. G. Sargent,
Attorney General.

Inc. 52474

Washington, D. C.,
October 20, 1926.

MEMORANDUM FOR THE ATTORNEY GENERAL.

In re: Question of whether or not the amendment of October 7, 1922, of the regulations of the Secretary of the Interior, relating to disposal of proceeds of oil and gas leases of restricted lands of the members of the Five Civilized Tribes could lawfully be made.

The Amendment of October 7, 1922.

"And *provided further*, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases."

Preliminary Observation.

There appears to be no case in point on this question and therefore it becomes necessary to decide it by a process of reasoning from established principles. This will be done by the statement of a series of basic propositions and the conclusion therefrom derived.

Propositions.

1. *Power and Authority of Congress.* The power and authority of Congress to impose restrictions upon the lands of the Five Civilized Tribes, provide for the removal of those restrictions and the disposal of the proceeds, for the benefit of the Indian, is no longer open to question. The right of exclusive legislation in this respect was reserved in section 1 of the Oklahoma Enabling Act, and was acquiesced

in by the state. The restrictions imposed upon the lands of these Indians was a continuance of the exercise by the United States of its guardianship and protection over the Indians and the issuance of allotments and the granting of citizenship "was in no wise inconsistent with the retention of control *over the disposition of the allotted lands* * * *." *Heckman* v. *United States*, 224 U. S. 413, 436; *Bowling* v. *United States*, 233 U. S. 528.

2. *Action of Congress.* Section 1 of the Act of May 27, 1908, provides that the Secretary may remove restrictions under such terms and conditions as to sale and as to disposal of the proceeds as may be embraced in regulations made by him, *for the benefit of the Indian.*

Section 2 of that act provides for oil and gas leases of these restricted lands under such rules and regulations as may be made by the Secretary of the Interior. Although the latter provision, as to leases, does not specifically state that such rules and regulations shall embrace the control of the disbursement of the moneys thereby derived, yet of course it necessarily follows that such must be part of the purpose of the trust thereby imposed in order that complete protection may be afforded to the Indian lessor. *United States* v. *Brown*, 8 Fed. (2d series) 564.

3. *Nature of Proceeds.* From the foregoing (points 1 and 2, *supra)* it follows:

(a). That the moneys derived from the leasing of restricted lands constitute a *federal* fund, the administration of which is a trust for the benefit of the Indians. *United States* v. *Thurston County*, 143 Fed. 237; *United States* v. *Brown, supra.*

(b) That the State of Oklahoma cannot pass any law interfering in any way with that administration, and that guardians of Indians appointed under state law can neither demand from the federal government the payment to them

of such funds so held, nor in any way direct or dictate their disposal contrary to the will of Congress.

Section 2 of the Act of May 27, 1908, specifically provides, as to the approval of the Secretary of the Interior of oil and gas leases of restricted lands, and the power to make rules and regulations concerning the same, that

> "the jurisdiction of the Probate Courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions * * *"

4. *Procedure Prescribed for Administration.*

(a) It is clear that Congress could have *specifically* indicated the precise disposition of proceeds from the sale or leasing of restricted lands for the benefit of the Indian, and could have directed that said funds be disbursed by the Secretary at a specified sum per month direct to the Indian, or by the Secretary disbursed for the support and maintenance of the Indian in other respects than by payments direct to him, and as to such disbursement it is clear the laws of Oklahoma and the guardians appointed under those laws could have no effect whatever. The existence of guardianship does not prevent the creation of a separate trust, the administration of which is beyond the control of the guardian. There is no necessary conflict.

(b) Congress saw fit to accomplish its purpose of protection of the Indians by creating a trust, by sections 1 and 2 of the Act of 1908, and vested the administration of it in the Secretary of the Interior *without specific limitations* of the manner in which he might administer. Hence, the power so conferred is broader than any powers which might have been specifically conferred.

(c) It follows that the regulations made by the Secretary, in his judgment and discretion in the administration of his trust, the necessity of those regulations, their effectiveness to accomplish their purpose, and his acts in the control and disbursement of said funds in accordance with

said regulations, cannot well be questioned, as indicated by well settled general principles, unless there is an abuse or arbitrary exercise of that discretion. *Wade* v. *Fisher*, 39 App. D. C. 245, 248; *United States, ex rel. Lane*, v. *Sykes*, 49 App. D. C. 48.

5. *Same—Decisions Defining the Secretary's Powers of Administration.*

(Here follow quotations from *United States* v. *Brown, et al., supra*, see same on page 17 of brief; also *United States* v. *Hinkle, supra*, see same, brief, page 20, and *Parker* v. *Richard, supra*, see same, brief, page 19.)

6. *Validity and Purpose of the Amendment of October 7, 1922 to Regulation 24.*

As section 2 of the Act of 1908 specifically grants the Secretary power to make rules and regulations as to oil and gas leases, it follows that the amendment to the rule in question is within his power unless, as already indicated, it constitutes an arbitrary exercise of or abuse of his discretion. (See discussion under point 4.)

It will now be sought to be shown that the amendment is reasonable in purpose and operation and designed to accomplish the true protection of the *cestui que* trust.

(a) The responsibility for the administration of the trust has been placed by Congress upon the Secretary as its agent. *(Wade* v. *Fisher*, 39 App. D. C. 245, 248.) It follows that whether he will delegate a portion of his functions to a state guardian, to some other agency, or exercise it himself, must be a matter solely in his discretion. The responsibility carries with it the accountability.

(b) Experience has demonstrated that abuses in administration of such trust funds sometimes occur where the Secretary surrenders control of the disbursement to a state guardian, and that a course of unvarying delegation of the administration of such trust to the state guardian is

unwise and not for the best interests of the Indian beneficiaries, as was formerly the procedure under Rule 24 prior to its amendment. It is no answer to say that the state guardians are accountable to the state courts. The responsibility for delegating the trust to the state guardian is in the Secretary and he must determine whether or not, in a particular case, he considers it wise to entrust such funds to the appointed guardian.

(c) The amendment does not *preclude* delegation to the state guardian of partial administration of the trust, and does not supersede or repeal original section 24 of the regulations. It supplements section 24, and makes possible a flexible administration, susceptible of rendering the best protection to the interests of the Indian beneficiary. Under section 24 and the amendment, the Secretary may pay reasonable amounts direct to the Indian where exigency or circumstances seem to render it advisable; may disburse funds to other persons for the benefit and immediate use of the Indian; may entrust substantial amounts to the state guardian, with or without restrictive conditions as to disbursement and supervision, and, in a word, exercise direct supervision and administration of his trust, or not, as his best judgment dictates.

Can there be any question under the foregoing observation, as to the reasonableness of purpose and function and operation of the amendment to section 24?

7. Consent of Indian Allottee.

(a) It is clear that under section 2 of the Act of 1908 the Indian has the *option of refusing to lease* his lands if he is not satisfied that the proceeds to be derived therefrom shall be subject to disposal by the Secretary in accordance with the regulations in that connection made by the Secretary, and in the event of such refusal he may retain his lands intact for the restrictive period imposed by Congress, and his rights will not in that event be violated because he still holds his lands and has the use of them.

(b) No disposal of such proceeds is made by the Secretary without the consent of the Indian lessee. Such consent is, as a matter of fact, actually obtained *in advance* by the Secretary before he approves the proffered lease. Every lease executed contains a provision that the lease is made subject to the rules and regulations of the Secretary of the Interior relating to the leasing of said lands. Up until July 7, 1925, the provision inserted in all oil and gas leases was as follows:

> "This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease."

Since that time a similar provision is inserted, which is as follows:

> "*Provided.* During the period supervision hereof is retained by the Secretary of the Interior, this instrument shall be subject to the supervisory regulations of said Secretary."

(c) Where the Indian is *sui juris* he, himself, consents by his signature to the lease, and it will be noted in this connection that section 6 of the Act of 1908 provides for the appointment of representatives of the Secretary of the Interior, whose duties, *inter alia,* shall be "to counsel and advise all allottees, *adult or minor,* having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made * * *."

If the Indian is under guardianship, consent is given by the guardian in executing the lease and by the state court in authorizing the execution of the lease.

(d) Although it has been the custom and practice of the Secretary, purely as a matter of precaution, to incorporate in the lease specific reference to the regulations, and by that reference expressly make the regulations part

of the lease, yet it is believed that such regulations would become part of the lease even though specific reference thereto were not made in the lease. The Indian lessor is, of course, *charged with notice* of the provisions of section 2 of the Act of 1908 to the effect that all leases must be made subject to the rules and regulations of the Secretary. Hence, it follows that the act of making the lease is an adoption of and acquiescence in such regulations as may be made.

With referenc to the rules of the Secretary of the Interior the Supreme Court said in *Caha* v. *United States*, 152 U. S. 211, 222, as follows:

> "Wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

There is thus no legal basis for either the Indian or his guardian, or the state court, to question the regulations, inasmuch as the consent of the Indian to the operation of the regulations attaches in advance, either by express provision in the lease or by implication of law from the fact of execution of the lease.

Conclusion.

I am therefore clearly of the opinion that the amendment of October 7, 1922, to section 24 of the regulations is a valid exercise by the Secretary of the authority conferred upon him by section 2 of the Act of 1908, to make rules and regulations concerning oil and gas leases of restricted Indian lands.

Respectfully submitted,

George P. Barse, Attorney.

Appendix "B."

Extract from opinion of attorney general of October 5, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"* * * Congress, however, has for many years placed supervision over Indians affairs in the Secretary of the Interior, as indicated in the Act of March 3, 1849 (9 Stat. 395), and sections 441 and 463 of the Revised Statutes of 1878. * * * Under these statutes, the Secretary of the Interior was not empowered to consent to the release of the restrictions thus imposed. Later, however, Congress passed statutes which permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior. * * *

"The Secretary has the power to remove restrictions from certain Indians funds. * * * Upon the removal of such restrictions from any fund, and the release of the fund to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with the trust company, I know of no legal objection to his doing so. * * *"

Appendix "C."

Extract from the opinion of the solicitor for the Interior Department, dated June 26, 1929, concerning power of the Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"These all indicate that the Secretary of the Interior stands largely in the capacity of a *quasi* or *de facto* guardian in the protection of restricted Indians and of their property." (c-8)

"* * * the power and duties so resting in the Secretary of the Interior cannot well be transferred or

delegated to any other agency, state or federal. Admittedly, the creation of a trust estate out of restricted Indian funds would lodge in some other tribunal or agency future supervision or control over such funds. From time to time under statutory authority hereinbefore referred to, Congress has authorized the Secretary of the Interior to remove restrictions * * *. When such action is had, Indians so situated can thereafter make such disposition of their property previously restricted, by creation of trust estates, or otherwise, as they may see fit to do. (p. c-9) * * *"

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Supreme Court,
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No. 781

In the Supreme Court of the United States

October Term, 1929.

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Brief Supporting Writ of Certiorari.

CHAS. B. ROGERS,
Tulsa, Oklahoma,
Attorney for Petitioner.

INDEX.

	PAGE
Opinions of courts below	1
Jurisdiction	1
Statement of the case	2
Statement of facts alleged in second amended bill	7
Statutes and regulations of Secretary of Interior involved	10
Outstanding questions presented by the petition	11
Specifications of error to be urged	12
Argument	14
It is settled that under said Act (1908) the restricted land, and the income derived therefrom in the form of royalties taken under oil leases, are impressed with the same trust character in the hands of and under the control of the Secretary of the Interior	14
The power of the Secretary to remove restrictions from the lands of Jackson Barnett, under the law has never been denied	15
No formality in removal of restrictions	15
When the Secretary approved the request of Barnett to transfer a portion of his restricted funds to his lawful wife, it was an adjudication of Barnett's competency, which he was authorized to determine, and that all restrictions upon the funds thus disbursed were removed	17
Oil and gas lease executed by Jackson Barnett was valid when approved by the Secretary	19
The Secretary likewise had authority under the regulations to release the funds derived from the royalties under the lease, and dispose of them in accordance with the request of the Indian in the absence of any charge of fraud or arbitrary action	20
Did the Secretary have the authority to approve the request of Barnett to transfer to his wife a portion of his bonds as a gift inter vivos, a portion of which bonds was to be placed in trust during the life of Bar-	

PAGE

nett, the income to the extent of $7500.00 per year to be paid to him? 23

Administrative jurisdiction is discretionary.. 25

Departmental construction of the Act of May 27, 1908 30

The action of the Secretary was in conformity with the well settled rule of construction of the Department of the Interior 34

Indian may dispose of his estate by will 36

The power of Congress over the Indians is plenary and political, and the exercise of that power is not subject to be controlled by the judicial branch of the Government, and the exercise by the Secretary of the Interior and the Commissioner of Indian Affairs, of an authority, duly delegated by the Congress, is likewise free from judicial control 37

Power of Congress, plenary and political.... 38

The exercise of discretion and judgment by an executive officer authorized to act, if honestly made, cannot be reviewed upon any issue of fact, without regard to whether said decision is right or wrong in the opinion of other men 41

In the absence of fraud, the exercise by a public official of an authority delegated to him by Congress cannot be reviewed by the courts, unless especially authorized by law so to do, and the official acts of such officer are presumed to be regular and he will be presumed to have properly discharged his duty, and the validity of the reasons upon which his judgment and act rests cannot be reviewed by the courts 41

The question of Barnett's mental status..... 46

The degree of mental capacity of the Indian, who is neither an idiot nor an insane person, certainly cannot limit, restrict or modify the lawful authority of the Secretary of the Interior to dispose of or disburse the restricted funds derived from oil leases under his regulations aforesaid 53

INDEX—Continued.

PAGES

Barnett's request not void under the laws of the District of Columbia 55

Mental weakness 55

The writ in cause No. 530, *United States* v. *Equitable Trust Company, et al.*, brings before this court for review the decision of Judge Knox upon the question of the authority for and the legality of the Secretary's action in approving the request of Jackson Barnett and transferring said bonds to the Equitable Trust Company 58

The action of the Secretary of the Interior was not arbitrary or capricious 64

Policy of the transaction 66

Conclusion 68

Appendix "A"—Letter dated December 11, 1906, Jno. G. Sargent to Hon. Hubert Work, and memorandum for the Attorney General regarding Amendment of October 7, 1922 75

Appendix "B"—Extract from Opinion of Attorney General of October 5, 1929 83

Appendix "C"—Extract from the Opinion of the Solicitor for the Interior Department, dated June 26, 1929 84

ACTS AND STATUTES.

Act of March 1, 1901, Sec: 7 (31 Stat. 861) 15

Act of June 30, 1902, Sec. 16 (32 Stat. 500) 15

Act of April 26, 1906 (34 Stat. 137) 15, 36, 66

Act of May 27, 1908, Chap. 199 (35 Stat. 312) . . . 10, 11, 15, 37

Revised Statutes (Sec. 465; U. S. C. A., Vol. 25, Sec. 2) . 27

Judicial Code, Sec. 240 (a), as amended by Act Feb. 13, 1925 1

Rules and Regulations, Secretary of Interior, Chap. 24, Secs. 1 and 2 11

Annotated Code, Dist. Col., Chap. 1, Sec. 1 55

Annotated Code, Dist. Col., 1919 Rev., Chap. 33 56

AUTHORITIES CITED.

PAGES

Am. Law Guardian, Sec. 138 57
Arnold v. *United States*, 264 U. S. 434, 68 L. ed. 375 60
Barnett v. *Barnett*, 121 Okl. 142 39
Barnett v. *Equitable Tr. Co.*, 21 Fed. (2d) 325 16
Blansett v. *Cardin*, 261 Fed. 309 28
Brader James v. *United States*, 241 U. S. 591 28
Bridgeman v. *United States*, 140 U. S. 577 27
Bruno v. *Getzelman*, (Okl.) 118 Pac. 850 18
Bundell v. *Wallace*, 267 U. S. 373 36
Castleman v. *Smith*, 148 La. 233, 86 S. 778 55
Chapman v. *Barney*, 129 U. S. 677, 32 L. ed. 800 6
Cherokee Nation v. *United States*, 5 Pet. 1 25
Collins v. *Miller*, 252 U. S. 364, 64 L. ed. 616 62
Confiscation Cases, 20 Wall. 92, 108 42
Conley v. *Nailor*, 118 U. S. 113 ..... 55, 56
Crutchfield v. *Easterday*, 26 App. Dec. 89 ..... 55, 56
Dagnett v. *Jenks*, (Kan.) 54 Pac. 136 17
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163. 42
DeCambra v. *Rogers*, 189 U. S. 119 ..... 41, 42
Decatur v. *Paulding*, 14 Pet. 497 30
Dennett v. *Dennett*, 84 Am. Dec. 97 56
Edwards v. *Darby*, 12 Wheat. 210 31
Eldred v. *Okmulgee L. & Tr. Co.*, 22 Okl. 742, 98 Pac. 929 51
Fetter v. *Fetter*, Sup. C. Dist. Col., 44 Wash. Rep. 87 .. 56
Goodrum v. *Buffalo*, 62 Fed. 817 38
Gormley v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1087 6
Hardin v. *Boyd*, 113 U. S. 756, 28 L. ed. 1141 6
Heckman v. *United States*, 56 L. ed. 820 ..... 24, 37, 38
Ingraham v. *Hardy*, (Kan.) 44 Pac. 16 18
In re Appeal of Barnett, 122 Okl. 166 ..... 39, 40
In re Jessie's Heirs, 259 Fed. 694 19
In re Knapp Estate, 41 N. Y. Supp. 156 57
In re Neggle, 39 Fed. 860 25
In re Strickland, L. R. 6 Chan. App. 266 57

AUTHORITIES—Continued.

PAGES

In re Tiger, 94 Okl. 103 36
Jacobs v. *Pritchard*, 223 U. S. 200 31
Jennings v. *Wood*, 192 Fed. 507 ..... 47, 48
Kendall v. *Ewert*, 259 U. S. 137, 42 Sup. Ct. 444, 66 L. ed. 862 ..... 47, 48, 49
Lee v. *Johnson*, 115 U. S. 48, 29 L. ed. 570 ..... 41, 43
Lewis v. *Teegarden*, 40 N. W. 1047 57
Lone Wolf v. *Hitchcock*, 47 L. ed. 299 ..... 37, 38
Mandeville & Jamesson v. *Wilson*, 5 Cranch. 13, 3 L. ed. 23 6
Martin v. *Mott*, 12 Wheat. 25 44
McKnight v. *U. S. Land Assn.*, 142 U. S. 161, 181, 35 L. ed. 980 26
Merwin on Equity, p. 113 55
Moore v. *Sawyer*, 167 Fed. 826 51
Morrison v. *Barnett*, 154 Fed. 617 48
Mower v. *Fletcher*, 114 U. S. 127, 29 L. ed. 117 61
Nor. Pac. R. Co. v. *Mitchell*, 208 Fed. 469 27
North Carolina R. Co. v. *Swassey*, 90 U. S. 405, 23 L. ed. 137 61
Parker v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954 ..... 14, 20, 21, 24, 25, 27, 37
Rainbow v. *Young*, 161 Fed. 835 ..... 24, 26, 28
6 Ruling Case Law, Sec. 50 56
Sawyer v. *White*, 122 Fed. 223 57
Seymour v. *South Carolina*, 2 Dist. C. App. 240 42
Shouler on Wills, Sec. 84 57
Silberschein v. *United States*, 266 U. S. 222 ..... 41, 42, 45
Snavely v. *Henderson*, (C. C. A.) 204 Fed. 978 50
Sperry O. & G. Co. v. *Chisholm*, 264 U. S. 486, 68 L. ed. 803 39
Steel v. *Smelting Co.*, 106 U. S. 447 ..... 41, 43
Tidal Oil Co. v. *West*, 30 Fed. (2d) 737 ..... 42, 45
Tracy v. *Sackett*, 59 Am. Dec. 610 56
United States v. *Alabama Ry.*, 142 U. S. 621, 35 L. ed. 1134 31

PAGES

United States v. *Brown*, 8 Fed. (2d) 564-561..... 14
United States v. *Chemical Foundation*, 272 U. S. 1, 71 L. ed. 1.....41, 42, 43
United States v. *DeBell*, 227 Fed. 760..... 18
United States, ex rel. West, v. *Hitchcock*, 190 U. S. 316.41, 42
United States v. *Fisher*, 223 U. S. 683..... 29
United States v. *Gypsy Oil Co.*, (8th Cir.) 10 Fed. (2d) 487..... 51
United States v. *Hinkle*, 261 Fed. 518.....20, 22, 24, 27, 37
United States v. *Hitchcock*, 190 U. S. 316..... 42
United States v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718..25, 28
United States v. *Mathewson*, 32 Fed. (2d) 745..... 18
United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 587....25, 28, 31
United States v. *McGugin, et al.*, (Kan.) 28 Fed. (2d) 76-78.....2-3, 20
United States v. *Moore*, 95 U. S. 763, 24 L. ed. 588..... 31
United States v. *Page*, 137 U. S. 673..... 42
United States v. *Rickert*, 188 U. S. 432, 47 L. ed. 532.... 37
United States v. *State Bank*, 6 Pet. 29..... 31
United States v. *Sykes*, 49 App. D. C..... 28
United States v. *Thurston County*, 60 L. ed. 1192..... 39
Viney v. *Abbott*, 109 Mass. 300..... 55
Wade v. *Fisher*, 29 App. D. C. 245, 248..... 28
Wheeler v. *Harris*, 13 Wall. 51, 20 L. ed. 531..... 61
Wilbur v. *United States*, 74 L. ed. 433.....42, 72
Wilcox v. *Jackson*, 13 Pet. 513, 10 L. ed. 1214..... 27
Williams v. *United States*, 138 U. S. 514, 34 L. ed. 1026.. 24
Work v. *United States*, 267 U. S. 175..... 29

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 810

MARSHALL L. MOTT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF SUPPORTING WRIT OF *CERTIORARI.*

Opinions of Courts Below.

The opinion of the United States District Court for the Northern District of Oklahoma herein was rendered on the 16th day of May, 1929 (R. 57-59), and is reported in 33 Fed. (2d) 340.

The opinion of Circuit Court of Appeals in said cause was filed January 27, 1930 (R. 68-72), no petition for rehearing was filed, and a copy of said opinion is found herein.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 3, 1930 (R. 72).

Jurisdiction of this court is invoked under section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

PROCEEDINGS: This action was instituted April 11th, 1928, in the United States District Court for the Northern District of Oklahoma, by the United States against Marshall L. Mott as defendant, to recover and have returned to the United States to be placed in the Department of the Interior, fifteen thousand dollars value of United States bonds, formerly under control of the Secretary of the Interior as restricted funds of Jackson Barnett, an enrolled full-blood, restricted Creek Indian, and to recover interest collected thereon, and for an accounting from the defendant; and, if said bonds cannot be recovered, then for the value thereof.

The dominant theory of the original bill of complaint (not in the record, and the same bill in form as was filed in the District of Columbia, Kansas, and California), is well stated by Judge POLLOCK in his opinion in *United States* v. *McGugin, et al.*, (Kan.) 28 Fed. (2nd) 76, as follows:

> "It is based on the thought, apparently, of the existence of a conspiracy on the part of the now wife of Jackson Barnett, Anna Laura Barnett, through the counsel, machinations and advice of defendants McGugin and Keith to carry said Barnett off and marry him *willy-nilly*—to the end that said conspirators might despoil him of his large wealth for their ultimate benefit and advantage."

The original bill of complaint in this case was, upon motion, dismissed in September, 1928, by the Hon. FRANKLIN E. KENNAMER, District Judge, who adopted the opinion of Judge POLLOCK in the *McGugin* case, *supra*.

On March 4, 1929, Attorney General Sargent approved a report of findings of fact and conclusions of law of Hon. Pierce Butler, Jr., Special Assistant Attorney General, who was specially appointed with the duty of investigating the Barnett transactions and suits, and which report as to the original bill of complaint concludes:

> "The bill sets up all the facts, ultimate and evidentiary, but *does not charge* as a conclusion from them that they show *either fraud and collusion on the part of anyone*, or *lack of authority in the Secretary to make the gifts.*" (Italics ours.)

Thereafter the United States filed its *first* amended bill (R. 1-34) to which appellee filed his motion and a supplemental motion to dismiss (R. 34-36) and later, while said motions were pending, the United States filed its application for leave to file its *second* amended bill. The reasons and grounds of the motion to dismiss were fully considered by the Department of Justice and the insufficiency of the first amended bill conceded.

Thus the Butler report to the Attorney General, *supra*, as to the first amended bill of complaint filed in the *McGugin* case, states:

> "The *essential elements of fraud, conscious deception respecting a material fact, are not in these statements* * * *. That in any suits to recover the dona-

tions, allegations of *fraud* or *imposition upon or collusion with, or deception of,* Government officers, or of the United States cannot be established."

An analysis of the allegation in the proposed substitute leads to the conclusion that the *theory* upon which this second amended bill is drawn is:

That Jackson Barnett, because of his alleged mental weakness and lack of understanding of—"the nature and extent" of his property and—"portions of it so disposed of and distributed," or—"the terms and conditions upon which the said delivery of said bonds was made by the Secretary of the Interior" was without legal capacity—"to make or to initiate the purported disposition and distribution of said bonds"—and for that reason the Secretary of the Interior was without authority of law to so transfer the same.

That the transfer and disposition of said bonds so made by the Secretary—"were not, and at no time have been, for the benefit of Jackson Barnett," and that said transfer and disposition were—"not only without warrant and authority of law, but contrary to the purpose, intent and effect of the law in such case made and provided"—and the defendants, having taken said bonds with full knowledge of the invalidity of said transfer, and without any lawful consideration, and said bonds being the property in law of Jackson Barnett, and being impressed with a trust character—*and the United States, through the Secretary of the Interior, being trustee,* the action lies in the name of the United States against the defendant for the recovery of

said bonds, or their value, together with interest thereon since February 1st, 1923.

The allegations contained in the second amended bill of complaint do not state any new *averment* of fact, but attempt to set forth a cause of action which neither the original nor first amended bill of complaint pleaded, as confessed by the United States in its brief filed in the Circuit Court of Appeals (p. 9) that:

> "The first amended complaint * * * proceeded on the *theory of fraud* * * * practiced on Secretary Fall * * *. The second amended complaint * * * *abandoned the charge of fraud* and tenders * * * the fact of incompetency of Barnett and the question of authority of the Secretary * * *."

In his decision Judge Pollock treated the Government's application for leave to file a second amended bill as an abandonment of its first amended bill and determined against the Government the issue as to the sufficiency of the second amended bill to state a cause of action and dismissed the action. (R. 55-59.)

In the Circuit Court of Appeals the Government in the sixth assignment of error alleged that "the decision, adjudication and decree of said District Court * * * in refusing leave and permission to the * * * United States * * * to file its * * * second amended complaint * * * and in dismissing the cause was an abuse of judicial discretion." (R. 62.)

The Circuit Court of Appeals in its opinion (R. 68-72) at the conclusion thereof, uses the following language:

> "The decree of dismissal is reversed with directions to reinstate the suit, permit appellant to file its

tendered second amended complaint, and give appellee reasonable time within which to file answer."

The opinion determines the questions of the sufficiency of the proffered second amended complaint, and in a trial in the District Court upon said second amended complaint the rules of decision set forth in the opinion challenged in our specifications of error (see petition, pages 9 and 10) become the law of the case. The attorney general, in his memorandum response to petition for the writ in this case (pp. 4-5) under heading "Reasons for Not Opposing the Petition," says:

> "Under ordinary circumstances we should oppose a petition for a writ of *certiorari* in such a case. We do not oppose the granting of the writ in this case because we believe a determination by this court of the questions decided in the court below, will lead to a speedy determination of burdensome litigation, pending in several of the District Courts."

For the foregoing reasons and under the rules of law and procedure laid down by this court in the following cases:

Hardin v. *Boyd,* 113 U. S. 756, 28 L. ed. 1141;
Gormley v. *Bunyan,* 138 U. S. 623, 34 L. ed. 1087;
Chapman v. *Barney,* 129 U. S. 677, 32 L. ed. 800;
Mandeville & Jamesson v. *Wilson,* 5 Cranch 13, 3 L. ed. 23,

it is apparent that the merits of the Government's action, as set forth in its second amended bill, is here for a proper review by this court.

Statement of Facts Alleged in Second Amended Bill.

The facts alleged (R. 46-53) are:

That Jackson Barnett was an adult, enrolled, full-blood member of the Creek Tribe of Indians, about 78 years of age, was allotted and owned lands in said nation in fee, subject only to restrictions against alienation thereof prior to April 26, 1931, and upon which lands in 1912, an oil and gas mining lease (R. 46) was duly executed and approved by the Secretary of the Interior under the provisions of sections 1 and 2 of the Act of May 27, 1908 (35 Stat. 312), pursuant to the regulations promulgated by the Secretary of the Interior relative thereto.

That royalties provided for in said lease had up to February 1st, 1923, accumulated in the hands of the Superintendent of the Five Civilized Tribes to the credit of Jackson Barnett, and subject to the control of the Secretary of the Interior, in the sum of $1,156,750.00. (R. 47-48)

That Jackson Barnett is alleged to be a mental incompetent, illiterate and incapable of managing his affairs and caring for his property and person and to understand the nature and extent of his property, and by reason of his mental infirmity he was unable to realize or understand the portions of his property which he requested to be transferred to his wife as a gift *inter vivos*. (R. 47.)

That on February 1, 1923, the Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs and upon the written request of Jackson Barnett, transferred and delivered to A. J. Ward, Creek Trib-

al Attorney, for the use and benefit of the American Baptist Home Mission Society, in trust, to be delivered to the Equitable Trust Company of New York, as trustee, $550,000.00 face value of bonds, and from the income of which trust fund twenty thousand dollars per year was *to be paid to the Superintendent of the Five Civilized Tribes for the use of said Barnett* during his lifetime (R. 48); and at the same time and as a part of the same transaction, upon the written request of Jackson Barnett, and upon the recommendation of the Commissioner of Indian Affairs said Secretary delivered to and into the hands of Anna Laura Barnett, wife of said Jackson Barnett, United States bonds of the par value of $550,000.00, which were to be the *sole, free and unrestricted* property of said wife, subject to her voluntary agreement to place $200,000.00 of said bonds with the Riggs National Bank as trustee, together with a trust agreement providing that said trust should continue during the life of Jackson Barnett, and providing for the payment to him personally from the income thereof $7500.00 per year, which agreement was kept by the said Anna Laura Barnett, and said trust created. (R. 48-49.)

That the County Court of Okmulgee County in 1912 appointed a guardian for Jackson Barnett as an incompetent person, which guardian assumed and was on February 1, 1923, assuming to exercise his office, which fact was set forth in the letter of recommendation signed by A. J. Ward, addressed to the Secretary of the Interior, although it is further alleged that subsequently the Supreme Court of Oklahoma rendered its opinion holding the appointment of said guardian of Barnett void from its inception. (R. 47)

That the action of the Secretary of the Interior in disbursing said funds was based upon the written request of Jackson Barnett (see copy attached to first amended bill, R. 22-25), together with a letter from the Creek national attorney (see R. 25-33) recommending the approval of said request, and a letter from the Superintendent of the Five Civilized Tribes concurring therein (R. 33) and a letter from the Commissioner of Indian Affairs containing a recommendation that the Secretary approve said request, all of which instruments were transmitted to the Secretary for his consideration and approval, and that they were so approved and the distribution of said bonds made in accordance therewith (see R. 50).

Alleging that the delivery of said bonds was made without the knowledge or consent of said guardian or of the County Court of Okmulgee County, Oklahoma, and that the delivery and distribution of said bonds was not for the benefit of said Barnett, and that the delivery of said bonds was made by the Secretary of the Interior without warrant or authority of law (R. 50).

That upon delivery of said bonds to Anna Laura Barnett, wife, she delivered fifteen thousand dollars of the bonds so received to the defendant, Marshall L. Mott, who, it is alleged, had actual knowledge of all the facts as to the delivery of said bonds to Anna Laura Barnett, and that said bonds had prior thereto been the property of Jackson Barnett, and that said defendant Mott knew said Barnett was a mental incompetent and said funds were trust funds under the jurisdiction of the Secretary of the Interior.

Statutes and Regulations of Secretary of Interior Involved.

The pertinent provisions of the Act of May 27, 1908, Chapt. 199 (35 Stat. 312), are as follows:

> "*Sec. 1.* * * * All allotted lands of full-bloods * * * including minors of such degrees of blood shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April twenty-six, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove restrictions, wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds, for the benefit of the respective Indians as he may prescribe.
>
> "*Sec. 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court, if a minor or incompetent, for a period of not to exceed five years, without the privilege of renewal: *Provided,* that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; * * *."

Chapter 24 of Rules and Regulations of the Secretary of Interior, concerning the collection, control and disbursement of the royalties and income under leases upon restricted lands of Indians, referred to in sections 1 and 2 of

the Act of May 27, 1908, aforesaid (amended regulations), provides:

> "* * * And *provided further*, that in such individual case or class of cases as the Secretary of the Interior may direct, the Superintendent of the Five Civilized Tribes shall cause such payment as may be authorized to be made out of the royalties and other individual funds of the restricted Indians, entitled thereto, or to be otherwise paid out for their benefit and use, as the Secretary of the Interior may authorize in such cases."

Paragraph 8 of the oil lease of Jackson Barnett, executed under the Rules and Regulations for such, duly promulgated by the Secretary of the Interior, reads as follows:

> "This lease shall be subject to the regulations of the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease; *provided, however*, that no regulations made after approval of this lease affecting either the rights of royalty, or payment thereunder, shall operate to affect the terms and conditions of this lease."

Outstanding Questions Presented by the Petition.

1. Whether the Secretary of the Interior, under said act (May 27, 1908, 35 Stat. 312), may unconditionally remove restrictions from the land, or the income derived therefrom held by him under such act and the regulations by him promulgated, and release control and responsibility therefor?

2. Whether the Secretary of the Interior, under the provisions of sections 1 and 2 of said act, can lawfully approve the request of an adult full-blood member of the Creek tribe of Indians to make a gift *inter vivos* to his lawful wife of a portion of his restricted moneys in the hands of said Secretary—derived from royalties under an oil and gas lease, executed by said Indian, on his restricted lands, under the provisions of said act and in accordance with rules and regulations promulgated by the Secretary for such purpose, and providing for the collection, care and disbursement of the proceeds derived from said lease as royalties, and whether said Secretary may lawfully transfer to said wife said fund upon request of said Indian?

3. Whether the discretionary judgment of the Secretary in the disposal of said fund in accordance with the request of said Indian, and free from any charge of fraud on the part of or deception of said officer, is subject to be reviewed and controlled by the courts?

4. Whether the degree of mental competence or incompetence of such restricted Indian, making such request of the Secretary, for the disposal of a portion of his restricted moneys to his wife as a gift, limits, restricts or modifies the authority and power of the Secretary in that behalf?

Specifications of Error to Be Urged.

The Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the Secretary of the Interior had no right to dispose of a portion of the restricted trust funds of Barnett, in accordance with written request of Barnett, as a gift *inter vivos* to Anna Laura Barnett, his lawful wife, and that the approval of the Secretary of such disbursement of a portion of his trust funds was without authority of law (R. 71).

2. In holding that the Secretary of the Interior was without authority, under the Act of May 27, 1908 (35 Stat. 312), to unconditionally remove restrictions from trust funds and to release said funds, wholly or in part, to either Barnett or in accordance with Barnett's request (R. 71).

3. In holding that after removal of restrictions by the Secretary, wholly or in part, upon the trust funds and at the request of Barnett, the Secretary of the Interior was under the act, *supra,* required to see that such funds are disbursed "for the benefit of the Indian," and "that he (the Secretary) agree to the disposal thereof" (R. 71).

4. In holding that the exercise by the Secretary of his discretion and judgment as to what portion of Barnett's trust funds might be disposed of as gifts to his wife, was subject to judicial review.

5. In holding that the action by the Secretary in the approval of Barnett's request and the transfer of the bonds to Barnett's wife as a gift *inter vivos,* was an arbitrary and unwarranted act (R. 72).

6. In refusing to hold that the acts of the Secretary of the Interior, in the exercise of his discretion and judgment,

in the approval of the request of Jackson Barnett for the transfer of said bonds, as a gift *inter vivos* to his wife in the sum of five hundred and fifty thousand dollars, in the absence of any charge of fraud against said official or those charged with the administration of Indian affairs, or any charge of deception practiced upon the Commissioner of Indian Affairs or the Secretary of the Interior as to the facts, was a valid exercise by the Secretary of his discretion and judgment as to the disposal of said funds for the benefit of said Indian, and is not subject to review.

ARGUMENT.

I.

It is settled that under said Act (1908) the restricted land, and the income derived therefrom in the form of royalties taken under oil leases, are impressed with the same trust character in the hands of and under the control of the Secretary of the Interior.

United States v. *Brown*, 8 Fed. (2d) 564-567, considering the provisions of Act of May 27, 1908, *supra*, said:

> "The act does in terms, however, authorize the making of these leases subject to the approval of the Secretary of the Interior. It must be conceded that the royalties accruing therefrom are lodged with the officers of that department impressed with the same trust as are the lands themselves. *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529; *United States* v. *Hinkle*, (C. C. A.) 261 Fed. 518; *United States* v. *Moore*, (C. C. A.) 284 Fed. 86."

See, also,

Parker v. *Richard*, 250 U. S. 235.

Under the provisions of the Act of March 1, 1901, Original Creek Agreement, Sec. 7 (31 Stat. 861), and Act of June 30, 1902, Supplemental Creek Agreement, Sec. 16 (32 Stat. 500), and the provisions of Act of April 26, 1906 (34 Stat. 137), and the Act of May 27, 1908, Secs. 1 and 2 (35 Stat. 312), *supra,* the Secretary of the Interior had authority to remove the restrictions upon the alienation of Jackson Barnett's allotment.

The power of the Secretary to remove restrictions from the lands of Jackson Barnett, under the law has never been denied.

Section 1 of the Act of 1908, provides:

"* * * the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and *disposal of the proceeds* for the benefit of the Indian as he may prescribe. * * *"

No Formality in Removal of Restrictions.

The Circuit Court of Appeals, in its opinion, said:

"He (the Secretary) is given no authority to turn over the property or its proceeds to the Indian. * * *

"Assuming the Secretary had the power to remove restrictions on Barnett's disposition of the bonds as he had to remove restrictions on disposition of his allotment. Still the act further provides * * *. That the Secretary of the Interior was charged with the further duty and authority in the same transaction of seeing that disposal should be made for his benefit."

The Secretary, *when he removes restrictions, of necessity determines it to be for the benefit of the Indian allottee:* The act of removal of restrictions requires no formality. The Secretary by his approval of a deed to the land or of a request for the expenditure of a part or the whole of the restricted funds, removes the restrictions therefrom.

In *Barnett* v. *Equitable Trust Co.*, 21 Fed. (2nd) 325 (Judge KNOX), the court, in effect held that the funds, after the approval by the Secretary of the Interior of the request of Barnett, retained their restricted character, yet the *court* further held that he could make an order disbursing a portion of such funds as attorney's fees. The Court of Appeals reversed the holding by Judge KNOX that the funds were still restricted and held the fund was *"unrestricted"* and *"free funds,"* in the following language:

> "The property remained the Indian's, but he was restrained in its alienation, except as the Secretary might allow; when the Secretary concurred, he (the Indian) was free like another owner to transfer his rights. This applied as well to the proceeds of his land, in this instance, to the royalties arising from a lawful lease, as to the realty itself.
>
> *"When, therefore, Barnett with the Secretary's consent, gave the securities to the Mission, the funds passed to its hands unrestricted and as free funds.* * * *
>
> "We can, therefore, see no reason to say, the court's wings were clipped by *restrictions,* which the *Secretary had lawfully, if improvidently, removed.* * * *." (34 Fed. (2nd) 916.) (Italics ours.)

There is a clear distinction between the absolute release of all control or authority over the bonds delivered

to Mrs. Barnett (as alleged in the second amended bill), and a reservation in the trust agreement, executed by the American Baptist Home Mission Society and Barnett, with the Equitable Trust Company as to that donation, wherein the income from said trust fund to the extent of $20,000.00 per annum was required to be paid by the trustee into the hands of the Superintendent of the Five Civilized Tribes, as appears from said trust agreement. The Secretary did retain control and authority over a portion of the income from said bonds. This was not true in the gift to Mrs. Barnett. The act of approval by the Secretary, and the delivery to the wife, constituted a removal of restrictions and made the transfer complete.

This view is consonant with the views of Solicitor Finney in his opinion of June 26, 1929 (Appendix C) (p. 84 hereof); and the opinion of Attorney General Mitchell of October 5th, 1929 (Appendix B) (p. 83 hereof).

When the Secretary approved the request of Barnett to transfer a portion of his restricted funds, to his lawful wife, it was an adjudication of Barnett's competency, which he was authorized to determine, and that all restrictions upon the funds thus disbursed were removed.

The approval by the Secretary of a conveyance, is a removal of restrictions of the right to alienate his land.

In *Dagnett* v. *Jenks*, (Kan.) 54 Pac. 136, the court says:

> "Under the patent to Edward Dagnett, the land was vested in him, subject to the restrictions contained therein; that the conveyance * * * having been approved

by the Secretary of the Interior, divested the title of the United States therein, and placed the title outside of the restrictions upon the sale of Indian lands."

In *United States* v. *Mathewson*, 32 Fed. (2d) 745, the court said:

"By this portion of the statute the Secretary of the Interior was given the right to remove the restrictions from this land, and, in his approval of the deed, he did remove the restrictions."

In *Ingraham* v. *Ward*, 44 Pac. (Kan.) 16, the court says:

"Neither the treaty nor the Act of Congress expressly provides any conditions or limitations, restrictions or guards, and hence the matter of *consent and approval* rested in the discretion and power of the Secretary. * * * when he acts and approves, the transfer is complete and the conveyance valid. * * *"

In *Bruno* v. *Getzelman*, (Okla.) 118 Pac. 350, the court says:

"It therefore follows that the plaintiff, having conveyed the lands by the approval of the Secretary of the Interior, the Indian title was thereby extinguished, and the grantee held said lands free from any restrictions upon alienation."

In *United States* v. *DeBell*, 227 Fed. 760, Judge SANBORN, speaking for the court, says:

"The United States, by its Acts of Congress, empowered the Secretary of the Interior to consider and determine whether or not Pehinji was competent and capable to manage his own affairs, and empowered him, if he found that he was so competent, to issue

to him a patent in fee simple, and the Congress enacted that if he did so, all restrictions upon the sale and conveyance by Pehinji of this land were removed. The Secretary so found, and issued the patent. This patent in itself constituted a conveyance of the complete title to the land, and an adjudication that all restrictions upon the sale and conveyance thereof by the patentee were removed."

In re Jessie's Heirs, 259 Fed. 694, it was said:

"The restrictions may be removed upon the approval of a conveyance. The necessary act is the *concurrence of the Secretary in the transfer, and his assent and approval thereto.*"

Oil and Gas Lease Executed by Jackson Barnett Was Valid When Approved by the Secretary.

The oil and gas mining lease referred to in the proffered second amended bill appears in full on pages 14 to 18 of the record in No. 530, *United States of America* v. *Equitable Trust Company of New York, et al.*, in this court, and has been repeatedly referred to in the various suits involving the Barnett transactions here involved. The opinions of the attorney general of October 20, 1926, set out as Appendix "A" to this brief (page 75), and of March 4, 1929, the Butler opinion hereinbefore referred to, declare the oil and gas mining lease of Jackson Barnett, which was executed by him *sui juris* March 5, 1912, valid. Neither of said opinions are published in the official opinions of the attorney general.

In his report touching the validity of the oil lease of Jackson Barnett, among other things, Mr. Butler said:

"The lease of Barnett was approved by the Secretary and therefore valid whether Barnett was competent or incompetent. The regulations of the Secretary control such leases, and the leases incorporate the regulations then in effect and thereafter to be made." (Italics ours.)

The validity of the oil lease, executed by this Indian upon his restricted land, is confessed in the bill by the allegation of its execution and approval by the Secretary under said regulations, and the resultant accumulation of royalties thereunder.

The Secretary likewise had authority under the regulations to release the funds derived from the royalties under the lease, and dispose of them in accordance with the request of the Indian in the absence of any charge of fraud or arbitrary action.

—*United States* v. *John Hinkle*, 261 Fed. 518;
United States v. *McGugin, et al.*, 28 Fed. (2d) 76-78, with authorities cited;
Parker v. *Richard*, 250 U. S. 235, 39 Sup. Ct. 442, 63 L. ed. 954.

See also opinion of attorney general of October 20, 1926, *supra*, promulgated by said official for guidance of Department of Justice in the litigation in the various courts, concerning Jackson Barnett's property and affecting this identical transaction. A full copy of that opinion is attached hereto as "Appendix A" (page 75). (Opinion not published.)

See also extract from opinion of attorney general, dated October 5, 1929, concerning the power and authority of

the Secretary of the Interior *to unconditionally remove restrictions from trust funds belonging to individual Indians*, attached hereto as "Appendix B" (page 83); also extract from opinion of solicitor for Interior Department, dated June 26, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians, attached as "Appendix C" (page 84). (Opinion not published.)

In his opinion of October 20th, 1926, *supra*, the attorney general states two major propositions of law—after asserting that the Secretary did have the authority to approve the lease of Barnett, subject to his regulations *(supra)*:

(a) That the Indian, when he executed the lease gave his consent in advance for the collection, care and disbursement of the royalties by the Secretary, in accordance with said regulations.

(b) That Congress invested the Secretary with power to create said regulations and to determine their necessity, and their effectiveness for the purpose for which they were created—and that Congress saw fit to accomplish its purpose of protection of the Indian—and vested the administration and control in the Secretary of the Interior without specific limitation of the manner in which he might administer, "hence the power so conferred is broader than powers which might have been specifically conferred."

This court, in *Parker* v. *Richard*, *supra*, construing sections 1 and 2 of Act of May 27, 1908, said:

"Under the Act of 1908, as already shown, leases

of 'restricted land' for oil and gas mining, may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, 'and not otherwise.' The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus, the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior *of the collection, care and disbursement of the royalties has not occurred.* * * *

"In the absence of some provision to the contrary, the supervision naturally falls to the Secretary of the Interior. Rev. Stat. 441-463; *United States, ex rel.*, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 721, * * *; *Catholic* v. *Gibbon*, 158 U. S. 155, 156, 39 L. ed. 931, 936, * * *."

The opinion further says:

"There is nothing in the proviso indicating that it is intended in the meantime *to take from the Secretary or to commit to the court* the supervision of matter pertaining to the lease or the royalties. A purpose to do that doubtless will be plainly expressed." (Italics ours.)

In *United States* v. *Hinkle, supra*, the Eighth Circuit Court of Appeals, construing the same statute, says:

"We are of the opinion, however, that under sections 19 and 20 of the Act of April 26, 1906, and section 2 of the Act of May 27, 1908, and the regulations of the Secretary of the Interior promulgated July 7th, 1906, June 11th, 1907, and April 20th, 1908, the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indians of the Five Civilized Tribes, is vested in the Secretary of the Interior, *subject only to such rules and regulations as he may prescribe*, as an independent trust fund, separate and distinct from the trust estate

in the land itself, and the rules and regulations referred to show that the Secretary has elected to administer this trust, and to retain the custody and control of such funds, 'until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs' (nor did the approval of the County Court affect the matter of mineral rents and profits, as that was a matter beyond his jurisdiction)."

No better statement of the true principle governing this case could be made than the language of Judge POLLOCK in the instant case, 33 Fed. (2d) 341:

"That the Secretary of the Interior, holding the property derived from accumulated royalties in his hands in trust for the incompetent full-blood Creek Indian Jackson Barnett, had full power and authority to make the distribution he did in this case, and to bind the government thereto, is settled by adjudications binding here. See *Parker* v. *Richard*, 250 U. S. 236, 39 Sup. Ct. 442, 63 L. ed. 954; *United States* v. *Hinkle*, (C. C. A.) 261 Fed. 518, and many cases cited."

II.

Did the Secretary have the authority to approve the request of Barnett to transfer to his wife a portion of his bonds as a gift *inter vivos*, a portion of which bonds was to be placed in trust during the life of Barnett, the income to the extent of $7500.00 per year to be paid to him?

In the absence of any charge of fraud on the part of the officials having to do therewith, as in this case, it was within the discretionary power of the Secretary, upon the recommendation of the Commissioner of Indian Affairs, to approve said request of Barnett, and to lawfully transfer to

Barnett's wife such portion of his bonds, (which, according to the petition, was less than half of his then accumulated bonds and moneys, to say nothing of his lands, which were then (1923) producing over $60,000 per year income) a large portion of which bonds were to be by her placed in trust for the use of Barnett during his life.

The determination of what disposition of said funds was "for the benefit of the Indian," was a matter within the exclusive jurisdiction of the Secretary.

See opinion of attorney general, October 20, 1926 (appendix "A" hereto; page 75).

—*Rainbow* v. *Young*, 161 Fed. 835;
Heckman v. *United States*, 56 L. ed. 820;
United States v. *John Hinkle, supra;*
Parker v. *Richard, supra.*

It is apparent in the concrete discussions of this case under review by the Circuit Court of Appeals and in the decision by Judge Knox and in the various briefs by the Department of Justice and especially in the opinion by Mr. Pierce Butler, special assistant to the Attorney General, that the conclusions reached that the action of the Secretary in approving the donations of Barnett, and the trust agreements concerning the same was unlawful, was because there was no specific express authority granted him by Congress so to do.

This authority may be exercised in the absence of specific express authority of Congress.

—*Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026;

United States v. *McDaniel*, 7 Pet. 1, 8 L. ed. 587;
Cherokee Nation v. *United States*, 5 Pet. 1;
Parker v. *Richard*, *supra*;
U. S., ex rel. West, v. *Hitchcock*, 205 U. S. 80, 51 L. ed. 718.

Administrative Jurisdiction Is Discretionary.

In the exercise of the supervision and control of the Indian wards of the government, the Secretary of the Interior and Commissioner of Indian Affairs are charged by law, with the duty of acting as custodians of their property. Congress has given to these officers certain supervisory authority, and under this authority they have duties to perform which are not definitely defined and minutely expressed by statutes.

In *United States* v. *McDaniel*, 7 Peters 1-14, 8 L. ed. 587, it was said:

> "A practical knowledge of any one of the great departments of the government, must *convince* every person that the head of a department, in the distribution of its duties and responsibilities is often compelled to *exercise* his *discretion*. He is limited in the exercise of his powers by the law, but it *does not follow* that he must *show a statutory provision for everything he does*. No government could be administered upon such principles." (Italics ours.)

In re Neagle, 39 Fed. 860, Judge SAWYER, in citing the case, *supra*, said:

> "Neither constitution nor statutes can or do anticipate or point out, specifically, every possible right or

duty to be covered and secured. They must necessarily be general."

This court in *McKnight* v. *United States Land Association*, 142 U. S. 161-181, 35 L. ed. 980, said:

"The general words of those sections are not supposed to particularize every minute duty devolving upon the Secretary and every special power bestowed upon him. There must be some latitude of construction. In the language of this court in *Williams* v. *United States*, 138 U. S. 514 (34 L. ed. 1026), 'It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the * * * department, matters not foreseen, equities not anticipated, and, which therefore are not provided for by express statutes, may sometimes arise and therefore the Secretary of the Interior is given that *extending and supervisory power* which *will* enable him, in the face of these unexpected contingencies to do justice.

"The same remarks apply to the powers of the Secretary of the Interior, under a similarly worded section of the Revised Statutes (Sec. 463) to supervise and control the management of the Bureau of Indian Affairs which powers, so far as we are advised, have never been questioned." (Italics ours.)

In *Rainbow* v. *Young, supra*, the court quoted from Revised Statutes, aforesaid, and commented thereon, as follows:

"In our opinion the very language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the Pres-

ident and Secretary of Interior, to manage all Indian relations with a just regard, * * * to the rights and welfare of the Indian and to the duty or care of protection owing to them by reason of their state of dependency and tutelage."

The regulation (24 as amended by the order of October 7, 1922) has the force and effect of law.

In *Wilcox* v. *Jackson*, 13th Pet. 513, 10 L. ed. 1214, this court said:

"* * * The President speaks and acts through the heads of the several departments in relation to subjects which pertain to their respective duties.

"Thus, it is the especial law of this government that in Indian Affairs, when the Commissioner of Indian Affairs acts, and his action is approved by the Secretary, it becomes the action of the President of the United States."

In *Northern Pacific Ry. Co.* v. *Mitchell*, 208 Fed. 469, it is said:

"The President may act through the heads of the different departments, and when the head of a department acts, it will be presumed, in the absence of evidence to the contrary, that he acted by direction of the President."

Thus, under R. S. (Sec. 465; U. S. C. A., Vol. 25, Sec. 2) the regulation formulated and approved by the Commissioner of Indian Affairs and the Secretary with reference to the disposal of the proceeds of the lease of a restricted Indian had the force and effect of law.

—Bridgeman v. *U. S.*, 229 U. S. 577;

U. S. v. *John Hinkle, (supra);*

Parker v. *Richard, (supra);*
U. S. v. *McDaniel, (supra);*
West v. *Hitchcock,* 51 L. ed. 718;
Rainbow v. *Young, (supra);*
Brader-James v. *U. S.,* 241 U. S. 591;
Blansett v. *Cardin,* 261 Fed. 309.

The attorney general in the opinion of October 20, 1926, concerning the validity of the amended regulation of October 7, 1926, concurred in the views as to the power of the Secretary to make rules, as follows:

"It follows that the regulations made by the Secretary in his judgment and discretion in the administration of his trust, *the necessity of those regulations, their effectiveness to accomplish their purpose,* and his acts in *control* and *disbursement* of said funds, in accordance with said regulations, *cannot well be questioned,* as indicated by well settled general principles."

—*Wade* v. *Fisher,* 29 App. D. C. 245, 248;
United States, ex rel. Lane, v. *Sykes,* 49 App. D. C.

"I am therefore clearly of the opinion that the amendment of October 7, 1922, to section 24 of the regulations is a valid exercise by the Secretary of the authority conferred upon him by Section 2 of the Act of 1908 to make rules and regulations concerning oil and gas leases of restricted Indian lands." (Italics ours.)

Under said regulations the Secretary and the Commissioner of Indian Affairs were undoubtedly vested with authority to construe said regulations in the manner and form that they intended it to apply.

In the case of *Work, Secretary of the Interior,* v. *United States, ex rel. Rives,* decided March 22, 1925 (267 U. S. 175), this court said:

> "*Ness* v. *Fisher,* 223 U. S. 683; *Riverside Oil Company* v. *Hitchcock,* 190 U. S. 316; *Alaska Smokeless Company* v. *Land,* 230 U. S. 549; and *Hall* v. *Payne,* 254 U. S. 343, * * * held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, *no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary.* * * * and the mere fact that the court might deem the ruling *erroneous in law gave it no power to intervene.* These cases are supported by earlier authorities to the same effect. *United States, ex rel. Tucker,* v. *Seaman,* 17 How. 225; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register,* 9 Wall. 575; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40. All rest upon the *Decatur* case." (Italics ours.)

It is not contended by the United States in the case at bar that the acts of the Secretary were either "*capricious or arbitrary*" in approving the donation.

In *United States, ex rel. Ness,* v. *Fisher,* 223 U. S. 683, this court said:

> "So, at the outset, we are confronted with the question, not whether the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the exercise of judgment or discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own, and not having his approval. The question is not new but has been often

considered by this court and, uniformly answered in the negative * * *."

In *Decatur* v. *Paulding*, 14 Pet. 497, the court said:

"The duty required by the resolution was to be performed by him as the head of one of the executive departments, in the ordinary discharge of his official duties. In general, such duties, whether imposed by Act of Congress or by resolution, are *not mere ministerial duties*. The head of an executive department of the government, in the *administration of the various and important concerns of his office*, is continually required to *exercise his judgment* in expounding the laws and resolutions of Congress, under which he is from time to time required to act. * * * *But their* (the Department's) *judgment upon the construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the Act of Congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the Secretaries nor revise his judgment in any case where the law authorized him to exercise his judgment or discretion. * * * The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them.* * *" (Italics ours.)

Departmental Construction of the Act of May 27, 1908.

Departmental construction may be examined as an assistant if not a criterion of the meaning and purpose of the act, and ordinarily controls the construction of the stat-

ute by the courts. This rule of construction is given added force from the provisions of the act which authorizes the Secretary of the Interior to make rules and regulations to carry out the purpose of the act.

In *Jacobs* v. *Prichard*, 223 U. S. 200 (56 L. ed.), it was said:

> "It is to be noted that all the proceedings are under the control of the Secretary of the Interior, and that any irregularity in them or improvidence in the consents can be corrected by him."

In *United States* v. *Moore*, 95 U. S. 763, 24 L. ed. 588, the court said:

> "The construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."
>
> —*Edwards* v. *Darby*, 12 Wheat. 210;
>
> *United States* v. *State Bank North Carolina*, 6 Pet. 29;
>
> *United States* v. *McDaniel*, *supra*.

In *United States* v. *Alabama Ry.*, 142 U. S. 621, 35 L. ed. 1134, the court held:

> "The contemporaneous construction thus given by the executive department of the government * * * should be considered as decisive of this suit."

The Department of the Interior throughout its administration of the act, *supra*, has consistently followed the uniform construction that the authority to disburse restricted funds was lodged in the Secretary of the Interior.

Opinion of Solicitor Mahaffie, June 12, 1917, as to authority of the Secretary to make investment of funds in purchase of bonds without the knowledge, consent or request of Barnett.

Opinion, James C. Davis, National Creek Attorney, February 24, 1920, holding:

> "In my opinion it is the law of the case * * * that if the Secretary * * * concludes and determines * * * that Jackson Barnett is possessed of mental capacity sufficient to enable him reasonably to understand its nature and purpose, then the Secretary is authorized by law to approve the same and set apart from the restricted funds * * * such sum as may be required for a compliance therewith, * * *."

Opinion, Solicitor Mahaffie, March 11, 1921, that:

> "The duty of thus protecting the interest of this full-blood Indian heir falls upon you, and I am of the opinion that royalties accruing from these lands are payable to such person as you may designate."

Opinion of A. J. Ward, National Creek Attorney, to the same effect as Creek Attorney Davis.

Opinion of solicitor approved by Secretary Fall, September 6, 1922, which as to removal of restrictions, held:

> "He may, in his discretion as seems best, pay the moneys to the allottee or he may disburse it on behalf of and in the interest of the * * * ward."

Opinion of Solicitor E. O. Patterson, of October 24, 1926, said:

> "The authority to administer such restricted funds

of necessity carries with it the absolute right to determine the method of administration."

Opinion of Solicitor E. C. Finney, of June 26, 1929, that:

"Congress has authorized the Secretary of the Interior to remove restrictions or issue certificates of competency to the Indians * * *. When such action is had, Indians so situated can thereafter make such disposition of their property, previously restricted by creation of trust estates, or otherwise, as they may see fit to do."

The opinions of the Department of Justice sustain and confirm the Departmental construction as to the Act of 1908, *supra.*

Opinion of Attorney General of October 20, 1926, said:

"Congress saw fit to accomplish its purpose of protection of the Indians by creating a trust, and vested the administration of it in the Secretary of the Interior *without specific limitations of the manner in which he might administer. Hence, the power so conferred is broader than any powers which might have been specifically conferred* * * *." (Italics ours.)

Opinion of Attorney General Mitchell of October 5, 1929, that:

"The Secretary has the power to remove restrictions from certain Indian funds. Upon the removal of such restrictions from any fund, and the release of the fund to the Indian, the *Indian may use the fund as he sees fit.*"

Opinion of the Comptroller General of the United States on the right of the Secretary of the Interior to pay out re-

stricted Indian funds coming into his hands (Vol. 22, Comp. Opins., p. 620):

> "* * * As to the sale and lease of the restricted lands under consideration, and the disposal of the proceeds of such sales or leases for the benefit of the restricted Indians, the above quoted statutory provisions seem to invest the Secretary of the Interior with superior jurisdiction in formulating and enforcing rules and regulations for sales or leases, or the disposal of the proceeds thereof.
>
> "Such view is emphasized by the second proviso of Section 2, making the jurisdiction of the Probate Courts of the State of Oklahoma subject to the foregoing provisions as to leases; that may be made with the approval of the Secretary of the Interior, 'and not otherwise.' * * *"

The action of the Secretary was in conformity with the well settled rule of construction of the Department of the Interior.

Whether the request of Barnett to deliver to his wife a portion of his trust funds in the hands of the Secretary was for the benefit of Barnett was a question fairly before the Secretary—he determined that question in the manner set forth, free from fraud or arbitrary conduct on his part—and its approval was an exercise of his discretionary judgment.

It will be noted that the transfer to the wife of the funds, charged in the bill, was to be "free and unrestricted," except subject to her voluntary agreement to place

$200,000.00 of the funds in trust during Barnett's life for his use (which was done).

The Circuit Court of Appeals held:

(a) That the Secretary could not unconditionally remove the restrictions from trust property (either land or funds), but must follow the same to see that the proceeds are used "for the benefit of the Indian" allottee.

(b) That the Secretary, under the provisions of law (Act of 1908) could not approve a request of an Indian to transfer a portion of his funds to his wife as a gift *inter vivos*.

Both of said conclusions above are in direct conflict with the cases cited and with the policy of the Interior Department since 1908. Many hundreds of cases, in the Five Civilized Tribes, of unconditional removal of restrictions upon the alienation of allotted Indian lands by the Secretary have been granted. Under the opinion of the Circuit Court of Appeals herein, the title to these lands, becomes subject to investigation by courts to determine whether the sales thus made were advantageous to the Indian, and will entail endless litigation.

Non-Indian citizens have considered it a valuable privilege to bestow upon their wives gifts *inter vivos* of a liberal portion of their estates. Why this privilege ceases to have virtue and receive commendation when applied to a rich Indian whose estate happens to be under the jurisdiction of the Secretary of the Interior, we are unable to understand.

Is it to be said that such a gift by an Indian is not for his benefit, or that he "loots" his estate by a gift to his wife of less than the succession laws of Oklahoma give to her on the death of her husband?

Indian May Dispose of His Estate by Will.

Section 23 of the Act of April 26, 1906 (34 Stat. 137), provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein * * *."

Congress by this Act authorized the Indian to dispose of his estate on the same footing as any other citizen, notwithstanding restrictions against alienation.

—*In re Tiger*, 94 Okl. 103;
Bundell v. *Wallace*, 267 U. S. 373.

If the Indian is to be permitted to alienate his property, in accordance with his wishes, after death, under what logic can it be said that he shall not, with the approval of the Secretary of the Interior, be permitted to dispose of a portion of his funds during his life?

Hon. Jas. C. Davis, Creek Tribal Attorney (Feb. 24, 1920), in an opinion upon the question of gifts by Barnett to various churches and institutions (administration of Cato Sells, Com. of Indian Affairs), used the following language:

"If an Indian has a sufficient understanding to determine the disposition of his property after death, the same Indian will necessarily have an equal understanding of the nature of a gift which he proposes to make during his life time." (Not officially reported. See Burke's testimony before Senate Indian Committee, *infra.)*

III.

The power of Congress over the Indians is plenary and political, and the exercise of that power is not subject to be controlled by the judicial branch of the Government, and the exercise by the Secretary of the Interior and the Commissioner of Indian Affairs, of an authority, duly delegated by the Congress, is likewise free from judicial control.

—*Lone Wolf* v. *Hitchcock,* 47 L. ed. 299;
United States v. *Rickert,* 188 U. S. 432, 47 L. ed. 532;
Heckman v. *United States,* 56 L. ed. 820;
United States v. *Hinkle, supra;*
Parker v. *Richard, supra.*

The last case above cited directly construed the provisions of the Act of May 27, 1908, as to the collection, care and disbursement of the royalties derived from a Creek restricted allotment.

Power of Congress, Plenary and Political.

In *Lone Wolf* v. *Hitchcock*, 47 L. ed. 299, the Supreme Court says:

> "Plenary authority over the tribal relations of the Indians has been exercised by the Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

In speaking of the relation of the Indian to the government, as represented by the Department of the Interior in *Heckman* v. *United States*, 56 L. ed. 208, the court said:

> "It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty."

In the consideration of questions pertaining to the *alienation*, or limitation upon the power to alienate, or to the control of the property of restricted Indians, the rules of law applicable to white persons have no application.

Thus in *Goodrum* v. *Buffalo*, 62 Fed. 817, the court used the following language:

> "The common-law rule relative to power of alienation or limitation upon that power do not apply in the relations of the federal government with the Indians and their property."

And again in *Heckman* v. *United States, supra* (page 445), in speaking of the representation by the United States of the interests of the Indian:

"Its efficacy does not depend upon the Indian's acquiescence. Nor does it rest upon convention, *nor is it circumscribed by rules which govern private relations.* * * *"

The exercise by said officials of the authority to control the restricted lands and income aforesaid, is not affected by state laws—and the appointment by a state court of a guardian over such restricted Indian does not affect the authority of the Secretary to control the restricted property.

—*Sperry Oil & Gas Co.* v. *Chisholm, et al.*, 264 U. S. 486, 68 L. ed. 803;

United States v. *Thurston County*, 60 L. ed 1192;

In re Appeal of Jackson Barnett, 122 Okl. 166;

Opinion of Vice Chief Justice BRANSON in *Barnett, et al.*, v. *Barnett, et al.*, 121 Okl. 142.

Thus, in *Sperry Oil & Gas Co.* v. *Chisholm, et al.*, *supra*, quoting from syllabus:

"4. Neither the constitution of a state nor any of its statutes, whatever rights they may confer on Indians or withhold from them, can withdraw them from the operation of an Act of Congress concerning them, passed in the exercise of its paramount authority."

In *Barnett* v. *Barnett*, 121 Okl. 142, Vice-Chief Justice BRANSON, as to the amended regulations of October 7, 1922, says:

"The regulation of 1922 *(supra)* was such a regulation as the officers of this state must respect. If the mental competency of this ward to initiate the donation

was questioned, *it was within the quasi judicial power of the Secretary of the Interior to pass on the same,* and ascertain whether he was of disposing mind; this is a power necessarily given him in performing the duties as to such Indians imposed by Congress. He passed on that in approving the request of the Indian. By his act, the legal and equitable title to the bonds in question passed, subject only to the trust agreements, and no state agency has any authority to interfere with such executed transaction."

And further in said opinion, he says:

"No court of this state, and no officer of such court has any concern with the restricted property of Jackson Barnett, in the hands of the Secretary of the Interior, nor has such court or officer any right to pursue a course the object of which is to defeat the disposition of such property, which the Secretary of the Interior has seen fit to make, at the request of the ward of the government."

Supreme Court of Oklahoma, *in re Appeal of Jackson Barnett*, 122 Okl. 160, attacking the validity of the order entered April 29, 1912, appointing a guardian over the person and estate of Jackson Barnett, reference to which is made in the second amended complaint of the United States in this cause, held said appointment void.

In the opinion it was stated:

"We must conclude that the judgment of the District Court of June 24th, reversing the County Court and decreeing that there was no valid appointment of Carl J. O.Hornett as guardian of Jackson Barnett, has, ever since its entry, been of full force and effect as a substitute for the judgment of the County Court. * * *

"The appointment of said E. S. Bailey as guardian of Jackson Barnett being made without any notice whatever can be of no more validity than the original appointment of Carl J. O'Hornett."

The lack of knowledge on the part of or the consent of the alleged guardian of Barnett or of the County Court having jurisdiction over said guardian, did not affect the validity of said transfer.

IV.

The exercise of discretion and judgment by an executive officer authorized to act, if honestly made, cannot be reviewed upon any issue of fact, without regard to whether said decision is right or wrong in the opinion of other men.

DeCambra v. *Rogers*, 189 U. S. 119;

United States, ex rel. Riverside Oil Co., v. *Hitchcock*, 190 U. S. 316;

Lee v. *Johnson*, 115 U. S. 48, 29 L. ed. 570;

Steel v. *Smelting Co.*, 106 U. S. 447;

United States v. *Chemical Foundation, Inc.*, 272 U. S. 1, 71 L. ed. 1;

Silberschein v. *United States*, 266 U. S. 222.

In the absence of fraud, the exercise by a public official of an authority delegated to him by Congress cannot be reviewed by the courts, unless especially authorized by law so to do, and the official acts of such officer are presumed to be regular and he will be presumed to have properly dis-

charged his duty, and the validity of the reasons upon which his judgment and act rests cannot be reviewed by the courts

—*Confiscation Cases*, 20 Wall. 92-108;
United States v. *Page*, 137 U. S. 673;
Dakota Central Tel. Co. v. *South Dakota*, 250 U. S. 163;
Silberschein v. *United States*, *supra*;
United States v. *Chemical Foundation, Inc.*, *supra*;
Tidal Oil Co. v. *West, Secretary*, 30 Fed. (2nd) 137;
Wilbur, Sec., v. *United States, ex rel. Kadrie*, 74 L. ed. 433 (Adv. Sheet 1929, No. 10);
United States, ex rel. West, v. *Hitchcock*, 205 U. S. 80;
United States v. *Hitchcock*, 190 U. S. 316;
Seymour v. *S. Carolina*, 2 Dist. C. App. 240.

The determination whether it was for the best interest of the Indian involved findings of fact, and the exercise of discretion and judgment thereon.

In *DeCambra* v. *Rogers*, *supra*, the court said:

"It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

In *United States, ex rel. West*, v. *Hitchcock*, *supra*, the court said:

"There is no provision for a re-examination by the courts of the question of fact so committed by him for decision, and, construing the nature of the question, the

plenary power of Congress in the matter, and the obvious difficulties in the way of such a re-examination, we think it is intended that there shall be none."

In *Lee* v. *Johnson, supra,* the court said:

"The findings of the Secretary * * * must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the Department, *upon matters of fact cognizable by it* has been expressly affirmed." * * *" (Italics ours.)

In *Steel* v. *Smelting Company, supra,* the court, referring to *Quinby* v. *Conlan, supra,* said:

"In *Quinby* v. *Conlan,* (104 U. S. 120), we said: 'It would lead to endless litigation, and be fruitful of evil, if a *supervisory power* were vested in the courts over the action of the numerous officers of the land department, on *mere questions of fact presented for their determination.* * * * On this subject we have repeatedly and with emphasis, expressed our opinion, and the matter should be deemed settled." (Italics ours.)

In *United States* v. *Chemical Foundation, Inc., supra,* the court said:

"The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."

The validity of the orders of the President was attacked by the Attorney General, on the ground that they constituted an unlawful delegation of authority, and, on the further

ground that the orders were induced by misrepresentation, and were made without knowledge of the material facts.

The court said:

"The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts.

"The President will be presumed to have known the material facts and to have acted in the light of them."

In the case at bar, there is no allegation that the Secretary of the Interior and the Commissioner of Indian Affairs were not advised of all of the material facts connected with the transaction complained about, and it is not alleged that either of these officers was deceived or misled as to the facts.

In *Martin* v. *Mott*, 12th Wheaton 25, the court speaking *per curiam*, said:

"Whenever a statute gives a *discretionary power to any person to be exercised by him upon his own opinion of certain facts it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts.* * * * It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. * * *

"Every public officer is presumed to act in obedience to his duty until the contrary is shown; * * * *it is not necessary to aver that the act which he may rightfully do, was so done, if the fact of the existence of the exigency were averred, it would be traversable, and, of course, might be passed upon by a jury; and thus the le-*

gality of the orders of the president would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury." (Italics ours.)

In *Silberschein* v. *United States, supra,* the court uses this language:

"The statute which creates the asserted right commits to the director of the Bureau the *duty and authority of administering its provisions and deciding all questions arising under it;* and in the light of the prior decisions of this court, we must hold that *his decision of such questions is final and conclusive and not subject to judicial review;* at least, unless the decision is wholly unsupported by the evidence, or is wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious. (Citing many cases.)

"*Since it is not made to appear from the allegations of the petition that any of these exceptional conditions exist, the judgment of the District Court must be and it is affirmed.*" (Italics ours.)

In *Tidal Oil Co.* v. *West, Secretary of the Interior, supra,* the court says:

"There is no averment of fraud or arbitrary action on the part of the Secretary. * * * To enter into a review of the terms of the contract to determine whether the Secretary committed error in the interpretation placed upon it, would amount to converting the present action into a proceeding in error to review the action of the Secretary. This cannot be done. The rule is general that, where the Secretary is called upon, in the exercise of the broad jurisdiction conferred upon him in relation to the disposition and control of

public or Indian lands, to determine his jurisdiction to act through an interpretation of a statute, or rules and regulations lawfully made in compliance with a statute, or to construe a contract made in pursuance thereof, his decision cannot be reviewed or disturbed by injunction or mandamus."

The Question of Barnett's Mental Status.

In its opinion the Circuit Court of Appeals, referring to the provisions of sections 1 and 2 of the Act of May 27, 1908, says:

> "These provisions of the act establish Barnett's legal incompetency to manage his own affairs, and so we need give no consideration to the allegations that he was in fact mentally incompetent." (See opinion, R. 70.)

Later in said opinion said court used the following language:

> "In *Barnett* v. *Equitable Trust Co.*, 21 Fed. (2d) 325 (the case now before this court on appeal, No. 530), Judge KNOX ordered that $550,000.00 in bonds held by the trust company, be returned to the Secretary of the Interior." (R. 71)

Judge KNOX in his opinion decided that the transfer of the bonds by the Secretary to the Equitable Trust Company, on the written request of Barnett, was void, *not because the Secretary had no authority to remove the restrictions which had been placed upon the property of Barnett, nor because of his lack of authority to approve such gifts and donations of his property as he in fact made,*

"but such approval, however honest and disinterested it may have been, cannot give validity to a gift or donation which the apparent donor did not make, and which by reason of mental incompetency he was incapable of making."

Citing:

Jennings v. *Wood*, 192 Fed. 507;
Kendall v. *Ewert*, 259 U. S. 137, 42 S. Ct. 444, 66 L. ed. 862.

The theory of the attorney general, on behalf of the government in its second amended bill in this cause, is that the Secretary of the Interior's action, in transferring said trust funds, was unlawful *because of the mental incompetency of the Indian to initiate the request to the Secretary* to transfer a portion of his property to his wife, and in that behalf cited in its brief to the court Judge KNOX's decision as authority. The Department of Justice at no time has disputed the authority of the Secretary of the Interior, under his regulations, to transfer the restricted moneys of an Indian to his lawful wife upon the Indian's request. The Department of Justice in the *Barnett* suits, for the first time, has questioned the authority of the Secretary to so transfer such funds on the ground that the Indian had not sufficient mental capacity to understand the nature and amount of his property and to comprehend elementary arithmetic and that portion of his property which he attempts to dispose of.

Notwithstanding the declaration of the Circuit Court of Appeals that it need give no consideration to the allegations that Barnett was in fact mentally incompetent,

the opinion reflects that the conclusion of the court, that the Secretary was without authority to approve the request of Barnett, was influenced by the allegation of mental incompetency, and by the decision of Judge KNOX, *supra*, otherwise its decision is in conflict with the theory upon which United States prosecutes this suit.

Judge KNOX, in his opinion in the New York case, said (see 21 Fed. (2d), p. 332):

> "While he (Barnett) is not insane and is not an idiot, his intelligence is so stunted and undeveloped that he lacked the capacity to know what he was doing. * * *
>
> "In consequence of this, and as stated at the outset, there was nothing upon which the approval of the Secretary could operate, and his acts in the premises were a nullity."

Neither *Jennings* v. *Wood, supra*, nor *Kendall* v. *Ewert, supra*, are authority for the conclusions reached by Judge KNOX in the New York case.

In *Jennings* v. *Wood, supra*, the Circuit Court held that the finding by the Secretary of the fact that an Indian was of lawful age, was not a conclusive finding, inasmuch as the Act of April 26, 1906, invested probate courts with jurisdiction over the leasing of the lands of minor allottees, and that the Secretary of the Interior had no jurisdiction thereof; citing *Morrison* v. *Barnett*, 154 Fed. 617, which held that after the passage of the Act of 1906, the Secretary had no lawful authority to approve or disapprove a minor Indian lease of the Five Civilized Tribes.

The Act of 1908, changed this as to restricted Indian minors. Neither the facts nor the principle of law involved in that case are involved here, and that case is certainly not an authority for the conclusion reached by Judge Knox.

In *Kendall* v. *Ewert, (supra)*, the sole issue was whether Paul Ewert, an Assistant to the Attorney General of the United States, could acquire a title by deed from Red Eagle, a Quapaw Indian.

The question of competency of the Indian to execute the deed was not involved.

The competency referred to was *as to a written dismissal of a suit.*

The invalidity of the deed was due to the fact that Ewert could not take the title by virtue of an Act of Congress, which prohibited a public officer of the United States from taking title from Indians.

That case contains no element of decision upon the authority of the court to review the discretionary judgment of the Secretary of the Interior.

The conclusions of Judge Knox are the first and only expressions of that principle of law as applied to the official authority of the Secretary of the Interior in Indian matters, and stand alone.

Judge Knox expressly found that the Secretary of the Interior had authority to remove the restrictions from alienation of Barnett's lands, and the authority to transfer the bonds to the Equitable Trust Company and Bar-

nett's wife upon the request of Barnett, 21 Fed (2d) 332. And further found that there was no fraud, corrupt purpose or intent on the part of officials of the Interior Department; and that the lease of Jackson Barnett was lawfully executed. (See same opinion.) After making those observations, Judge KNOX further concluded:

> "Whatever may have been his authority to release restrictions upon Barnett's property and admitting the honesty of his belief, and that of his subordinates, that the arrangements made were for the Indian's benefit, he was without authority, as were Burke, McGugin, Ward and Mrs. Barnett, to appropriate and give away property to which they had neither title nor power of disposition."

Quoting further from said opinion:

> "The alleged donor had no real comprehension and understanding of what he was induced to do, and thus was without that clear and unmistakable intention to part with his property, which is, as I understand the law, an essential requisite of a gift *inter vivos*. *Snavely* v. *Henderson*, (C. C. A.) 204 Fed. 978."

Snavely v. *Henderson, supra,* enunciates a rule governing the action of a non-Indian citizen in the making of a gift *inter vivos* of property and involved the issue of whether a transaction between a mother and her son was a gift *inter vivos* or a loan, and has no applicability to the issues involved before Judge KNOX.

It is, therefore, conclusive that Judge KNOX founded his decision solely upon the legal proposition that by rea-

son of Barnett's lack of capacity of mind to understand the nature and effect of the transaction involved, his act was void and the Secretary was wholly without authority to act upon his request.

> "Section 1 of the Act of May 27, 1908, provides that the Secretary may remove restrictions under such terms and conditions as to sale and as to disposal of the proceeds as may be embraced in regulations made by him *for the benefit of the Indian.*" (Opinion Atty. Gen. Oct. 20, 1926, *supra;* Appendix A, page 75.)

An oil and gas lease under the provisions of section 1 is an alienation within the meaning of the act.

—*United States* v. *Gypsy Oil Co.*, (8th Circuit) 10th Fed. (2d) 487;

Moore v. *Sawyer*, 167 Fed. 826;

Eldred v. *Okmulgee Loan & Trust Co.*, 22 Okl. 742, 98 Pac. 929.

Under the provisions of sections 1 and 2 of the Act of May 27, 1908, Congress vested the administration of this trust in the Secretary of the Interior "without specific limitations of the manner in which he might administer; hence the power so conferred is broader than any power which might have been specifically conferred." (Opinion Atty. Gen., *supra;* Appendix A, page 75.)

The consent of Jackson Barnett to the exercise of that authority by the Secretary was given when he executed the lease, as was said by the attorney general in his opinion (Appendix A, *supra)* (point 7, sub-div. A), thus:

> "No disposal of such proceeds so made by the Secretary without the consent of the Indian lessee,

Such consent is, as a matter of fact, actually obtained in advance by the Secretary before he approves the proffered lease. Every lease executed contains a provision that the lease is made subject to the rules and regulations of the Secretary of the Interior relating to the leasing of said land. Up until July 7, 1925, the provision inserted in all oil and gas leases was as follows: 'This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force, relative to such leases. All such regulations are made a part and condition of this lease'."

The attorney general further says (sub-division "C"):

"Where the Indian is *sui juris*, he, himself, consents by his signature to the lease * * *."

In this case the lease was executed by Jackson Barnett *sui juris*, March 5, 1912, and all the terms of the lease run to Barnett as lessor. (See record, Case No. 530, pages 14-20.)

Since the opinion of Judge KNOX in the New York case reflects the theory upon which the Department of Justice has proceeded in this case and since that decision has become a basis of authority in this case in the Circuit Court of Appeals, we take the liberty of commenting at some length upon what we regard as a misconception by Judge KNOX of the principle of law governing the exercise by the Secretary of the Interior of a discretionary power in the administration of his duties in Indian affairs.

We challenge this opinion as being in conflict with the underlying *basic* reasons for the delegation by Congress to the Secretary of supervisory control over the contracts and estates of restricted Indians.

Judge KNOX held, in effect, that Barnett must have sufficient understanding and intelligence to know the nature, extent and value of his property and estate, and of the extent and portion thereof which he was donating, and of the terms and conditions of the donation, and its effect upon his estate before he has the capacity to initiate such transaction. *This eliminated entirely from the case the basic reason for the supervision of his estate by the Secretary of the Interior,* and did not recognize any element of judgment or understanding in the matter by the Secretary. Under such a rule, there was no need or use for supervision, for, *with such understanding the Indian could transact his own business as well as the average non-Indian citizen.*

The degree of mental capacity of the Indian, who is neither an idiot nor an insane person, certainly cannot limit, restrict or modify the lawful authority of the Secretary of the Interior to dispose of or disburse the restricted funds derived from oil leases under his regulations aforesaid.

His authority to act in this matter, did not rest upon a given degree of intelligence in Jackson Barnett. Congress placed no such limitation upon the exercise of his discretion, and the courts cannot do that which Congress did not see fit to do.

What is said in the bill as to the mental capacity of Barnett, can be said of practically every one of the older full-blood Creek Indians, and a majority of the younger ones, all restricted alike, whether educated or uneducated, and all within what has always been classed as "Congres-

sional Restrictions," without regard to their individual mental capacity.

In every case where the Secretary exercised his discretionary judgment to remove the restrictions from the land, or to release the restricted moneys and disburse them upon the request of the Indian, a necessary element in the question before him, was *to consider and determine the mental capacity of the Indian as to the wisdom of the request.* The Indian's judgment as to what disposition of his money should be made, did not determine the action of the Secretary—it was the Secretary's judgment as to the wisdom and propriety of the act which controlled.

Barnett had sufficient mental capacity to execute a valid oil lease on his lands, and the execution of the lease was no less solemn or important in the law than the execution by him of a request to transfer a portion of his bonds to his wife. The lack of capacity to judge of the nature and effect or of the advantageous character of the lease to himself, was compensated for by the interposition of the judgment and experience of the Secretary, and thus the lease, when approved, was *for the best interest of the Indian,* and likewise Barnett's lack of knowledge of the extent and value of his property and of the effect of his act in transferring to his wife a portion of his bonds, was equally compensated for by the interposition of the judgment and experience of the Secretary in that behalf, and his judgment is no less conclusive in the one case than the other.

Barnett's Request Not Void Under the Laws of the District of Columbia.

The entire transaction pertaining to the Jackson Barnett donations was consummated in the District of Columbia and it is undebatable that the *lex loci contractus* determines the validity of a voluntary gift *inter vivos*, of personal property.

The gift of Jackson Barnett was burdened with a trust for the benefit of the donor and if he were otherwise capable of making the gift, it was valid thus burdened.

—Merwin on Equity, p. 113;

Viney v. *Abbott*, 109 Mass. 300, cases cited;

Castleman v. *Smith*, 148 La. 233, 86 S. 778.

Such gift needs no consideration to support it—

Castleman v. *Smith, supra.*

The common law of Maryland was in force in the District of Columbia as to contracts and the power to make them.

—Annotated Code, Dist. Col., Chap. I, Sec. 1;

Crutchfield v. *Easterday*, 26 App. Dec. 89.

Mental Weakness.

Weakness of intellect if not amounting to insanity does not justify setting aside a contract made unless upon grossly inadequate consideration or of an undue advantage taken of the inferior mentality.

—*Conley* v. *Nailor*, 118 U. S. 113;

Crutchfield v. *Easterday, supra;*
6 Ruling Case Law, Sec. 50;
Dennett v. *Dennett,* 84 Am. Dec. 97;
Tracy v. *Sackett,* 59 Am. Dec. 610.

In *Hulda M. Fetter* v. *William H. Fetter, et al.,* Supreme Court of District of Columbia, 44 Washington Law Reporter 87, the court said, touching one of the issues of that case:

> "In this jurisdiction it is well established that *weakness of intellect, if not amounting to insanity,* does not justify setting aside a contract unless accompanied by gross inadequacy of consideration, or unless undue advantage is taken of inferior mentality,—
>
> *Conley* v. *Nailor,* 118 U. S. 113;
> *Crutchfield* v. *Easterday,* 26 App. Dist. Col. 89, 33 W. L. R. 504."

In *Conley* v. *Nailor,* the United States Supreme Court used the following language:

> "Extreme weakness of intellect, even when not amounting to insanity in the person executing a conveyance may be sufficient ground for setting it aside, when made upon a nominal or grossly inadequate consideration * * *."

At common law there is no restraint upon the husband to transfer over to his wife by gift *inter vivos* his personal property.

Under Chapter 33, 1919 Revision, Code, Dist. Col. Laws, this right is clearly established as to both real and personal property.

The District of Columbia has no statutory definition of the limitation of the power to contract. The common law rule governs.

In *Sawyer* v. *White*, Nos. 1816 and 1817, 122 Fed. 223, the court said:

> "But the question of his mental capacity is not whether or not the powers of his mind were impaired, or whether or not he had ordinary capacity to do business, but whether or not he had any—the smallest—capacity to understand what he was doing, and to determine intelligently whether or not he would do it. *Mann* v. *Keene Guaranty Sav. Bank*, 29 C. C. A. 547, 548, 86 Fed. 51, 62; *Rugan* v. *Sabin*, 3 C. C. A. 578, 53 Fed. 415, 421; *Stewart's Ex'r* v. *Lispenard*, 26 Wend. 303; *Ex parte Barnsley*, 3 Atk. 168; *Hill* v. *Nash*, 41 Me. 586, 66 Am. Dec. 2661; *Jackson* v. *King*, 4 Cow. 216, 15 Am. Dec. 354; *Dennett* v. *Dennett*, 44 N. H. 531, 84 Am. Dec. 97. * * *"

—*In re Strickland*, L. R. 6 Chan. App. 266;

In re Knapp Estate, 41 N. Y. Suppl. 156;

Am. Law Guardianship, Sec. 138.

Under the foregoing decisions, laws of the District of Columbia and the generally expressed common law, the act of Jackson Barnett was *not void*.

Barnett is not alleged nor is it claimed he is either an idiot or a lunatic.

In *Lewis* v. *Teegarden*, 40 N. W. 1047, the court said:

> "With deference to the authority cited, it is our judgment that the capacity to execute a will is the perfect requisite for the execution of a gift *inter vivos*."

See Shouler on Wills, Sec. 81.

Not having been adjudged a mental incompetent he could lawfully execute a will (p. 36, *supra)* or act as any other adult full-blood Indian.

Not being insane nor an idiot his act was not void and there was a tangible legal transaction coming to the hands of the Secretary and Commissioner upon which they might and did act.

The writ in cause No. 530, *United States v. Equitable Trust Company, et al.*, brings before this court for review the decision of Judge Knox upon the question of the authority for and the legality of the Secretary's action in approving the request of Jackson Barnett and transferring said bonds to the Equitable Trust Company.

On pages 8 and 9 of the brief for the United States, in No. 530, *United States* v. *Equitable Trust Co., et al.*, supporting the writ of *certiorari*, the Solicitor General says:

> "The case was tried November 16 to 24, 1926, before the District Court. (R. 1-2.) *The single controlling issue of fact on the Government's pleading was the mental condition of Barnett. The single important issue of law was whether, in view of Barnett's mentality, the Secretary of the Interior had the power to authorize the disposal of the funds in question. On August 9, 1927, the District Court rendered an opinion* (R. 83) *holding that the gift was void because of the plaintiff's incompetence and lack of comprehension and understanding of his action in making the same* (R. 94-95); *that the gift could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds to the Secretary of the Interior to be held by him as the property of plaintiff* (R. 95-96).

On November 21, 1927, a decree to this effect was entered. (R. 96.) The decree, however, retained jurisdiction of the cause, and the property, for the purpose of entertaining and deciding applications by counsel for plaintiff, and counsel for defendants, for allowances out of the property for their services and disbursements.

"Such applications were postponed pending an appeal taken by the defendant The American Baptist Home Mission Society. Such appeal was dismissed May 7, 1928, by the Circuit Court of Appeals because The Equitable Trust Company, another defendant, had not been made a party. 26 F. (2d) 350. Application made to this court for a writ of *certiorari* was thereafter denied (278 U. S. 626), *so that the decision of the District Court became final on the merits of the original action.*" (Italics ours.)

Upon the foregoing statement it is apparent:

(a) That the determination of the issue brought here by the Government's petition involves a determination of whether Judge KNOX's decision in that cause as to the authority of the Secretary is erroneous.

(b) A correct decision by this court upon the legality and propriety of the allowance of attorneys' fees, without the consent of the Secretary of the Interior, necessarily cannot be reached without deciding the issue before the District Court as to the Secretary's authority to transfer the bonds.

(c) That by reason of the reservation by the lower court of jurisdiction to make the further order as to counsel fees, said decree of November 21, 1927, was not a final decree, but became final upon the judgment and order of

January 8, 1929, allowing counsel fees to Bailey's counsel out of the funds.

In support of our contention that the decree of November 21, 1927, which the Solicitor General contends became final upon the dismissal of the appeal therefrom by the Baptist Society (26 Fed. (2d) 350), upon the merits of the cause, was not a final decree, and, therefore, not then appealable, we cite the following opinions of this court:

Arnold v. *United States*, 264 U. S. 434, 68 L. ed. 375, quoting from the opinion:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262, 264, 37 L. ed. 443, 444, 13 Sup. Ct. Rep. 590; *Collins* v. *Miller*, 252 U. S. 364, 370, 64 L. ed. 616, 618, 40 Sup. Ct. Rep. 347; *Oneida Nav. Corp.* v. *W. & S. Job. & Co.*, 252 U. S. 521, 522, 64 L. ed. 697, 40 Sup. Ct. Rep. 357; and cases therein cited.
>
> "And it is clear that the present case does not come within the seeming exception to this rule that an adjudication, final in its nature as to a matter distinct from the general subject of the litigation, and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. See *Williams* v. *Morgan*, 111 U. S. 684, 699, 28 L. ed. 559, 565, 4 Sup. Ct. Rep. 638, and *Collins* v. *Miller*, 252 U. S. 371, 64 L. ed. 619, 40 Sup. Ct. Rep. 347.

There has been no final adjudication of the amount which Guimarin & Company is entitled to recover on the bond; and, furthermore, its right to a recovery is not distinct from the general subject of the litigation, but involves the determination of questions affecting the intervening creditors, who are likewise parties to the suit, as well as itself, and which, under the statute, are to be determined in a single action"

Mower v. *Fletcher*, 114 U. S. 127, 29 L. ed. 117:

"That judgment is final for the purposes of a writ of error to this court, which terminated the litigation between the parties on the merits of the case, so that if there is to be an affirmance here, the court below would have nothing to do but to execute the judgment it had already rendered. *Bostick* v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, and the numerous cases there cited. * * * Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered."

North Carolina R. R. Co., et al., v. *Swasey, et al.*, 90 U. S. 405, 23 L. ed. 137:

"With these well settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the state must pay in order to stop the sale has not been determined; neither has it been determined what amount of stock may be sold if the debt is not paid. In each of these questions the state has a direct interest, and through its representatives in court has the right to be heard. They must be settled before the litigation can be said to be at an end."

Wheeler v. *Harris*, 13 Wall 51, 20 L. ed. 531:

"A decree of affirmance, without taxation of costs

and without specifying the sum for which it is rendered, is defective and is not a final decree."

In *Collins* v. *Miller*, 252 U. S. 364, 64 Law ed. 616, cited by this court in *Arnold* v. *United States, supra*, this court reviews former decisions and lays down the doctrine that a decree which cannot be immediately executed upon an affirmance is not a final decree.

The United States under the first decree could not have executed the judgment in its favor and have the fund transferred to the Secretary, the amount of the award not having been finally determined; nor, if a proper appeal were had, could it have had execution on an affirmance thereof, for the same reason.

It will be remembered that counsel for Bailey, next friend, representing Barnett in the New York case, sought allowances under a contingent fee contract executed by said attorneys with Bailey as acting guardian of Barnett, copy of which is set out (Tr. record No. 530, pp. 127-130) under the terms of which contract the attorneys for Bailey are entitled to compensation *only* in the event "of the recovery of said funds," and which contract further in terms assigns to said attorneys a percentage of "Barnett's cause of action."

Judge Knox, in his decision, after holding that the transfer of the bonds by the Secretary to the trust company upon Barnett's request was void and unlawful because of Barnett's lack of mental capacity to make the donation, in his second decree awarding counsel fees used the following language (p. 162):

"Had the Secretary of the Interior never permitted the fund which forms the subject-matter of this suit to go beyond his possession and control, it is agreed that the court would be powerless to grant relief to any of the present petitions. The then Secretary, however, saw fit to release the supervision over the disposition of the fund which had been committed to him by Congress. * * * The fund is now a *res* within the control of this court, and justice requires that such *res* should bear the fees and expenses of its preservation."

The Circuit Court of Appeals in its opinion (21 Fed. (2nd) 325) sustained the authority of the District Court awarding counsel fees, but upon the theory that the transfer of the bonds by Barnett with the Secretary's consent passed the funds to the trustee lawfully. Thus the court says:

"When, therefore, Barnett, with the Secretary's consent, gave the securities to the Mission, the fund passed to its hands unrestricted and as free funds * * *. We can, therefore, see no reason to say the court's wings were clipped by restrictions which the Secretary had lawfully if improvidently removed."

The Solicitor General took the position in the Circuit Court of Appeals that the findings of Judge KNOX in the first instance, that Barnett had not sufficient mental capacity to make the donation, therefore, its approval by the Secretary was wholly void; and in the second instance, that the transfer of the bonds to the trust company was a lawful surrender of further control over the bonds by the Secretary, were fatally inconsistent, and in that regard says

(quoting from the brief of the Solicitor General in that case):

> "The position of the court in the decree here for review is inconsistent. The fund is either restricted or it is unrestricted, and if the approval by the Secretary of the Interior removed the restrictions therefrom, the court is without power to reimpose such restrictions, such being a prerogative resting solely with Congress."

In the light of the foregoing, it seems that this court must necessarily review the decision of Judge KNOX upon the question of the authority or lack of authority of the Secretary in the first instance to transfer the bonds, which question of necessity, is involved in the legality or propriety of the decree of the court fixing the award of counsel fees.

V.

The Action of the Secretary of the Interior Was Not Arbitrary or Capricious.

The Circuit Court of Appeals in the case at bar, in its opinion used the following language:

> "And so we conclude there was *arbitrary* and unthorized action by the Secretary violative of the trust, with full knowledge on the part of all participants." (R. 72) (Italics ours.)

The United States in its proffered second amended bill does not charge that the action of the Secretary was "arbitrary or capricious." If the term "arbitrary," as thus used by the Circuit Court of Appeals, is in the sense that

the Secretary acted without any evidence or any practical reasons to support his acts, the conclusion of the court is clearly not supported by either allegation or proof. If such conclusion was based upon the allegation in said proffered bill that the action of the Secretary "was not for the benefit of Barnett," then such conclusion is not founded upon any proof. The determination of that question, even if it be within the proper jurisdiction of the court (which we dispute) could not be made without the true facts and reasons before the court upon which the said officials acted.

The *undisputed* facts upon which said officials based their action have been presented in court *(Barnett, Incomp., v. Equitable Trust Co., et al.)* and before Committees of Congress. No transcript of the record in the New York case has ever been prepared. A complete history of the Barnett transaction as shown by files in the Indian office, and a full recital of the reasons and basis of the departmental action, were given before the House Committee on Indian Affairs, in 1925 (House Record No. 1527, 68th Cong., 2nd Sess.), and again, before a sub-committee of the Committee on Indian Affairs of the United States Senate, pursuant to S. Res. No. 79, in 1929.

Senate Hearings, 70 Cong., 2nd Sess., Part 4, pp. 1624-1730.

These records contain detail of facts as given by the testimony of former Commissioner of Indian Affairs Burke, Assistant Commissioner Merritt, Assistant Secretary Goodwin, and Creek Attorney A. J. Ward, before the House Committee on Indian Affairs and the testimony of former

Commissioner Burke before the Senate Committee on Indian Affairs, all of which facts so stated are in evidence in the New York case.

These stated facts show conclusively that the action of the officials were founded upon substantial and commendable policy and reasons, and wholly refute any claim that the acts of the officials were "arbitrary or capricious." The conclusion of the Circuit Court of Appeals is contrary to all the undisputed facts, and if that issue be considered here, we invite this court to review the testimony and statement of facts as shown in the public documents referred to, *supra*, and especially the testimony of former Commissioner Burke before the Senate sub-commmittee of Indian Affairs.

Policy of the Transaction.

Resting in the judgment of the Secretary of the Interior and Commissioner of Indian Affairs were all questions of policy.

Whether Barnett's request and the disposition of his funds thus proposed was for the "best interest of the Indian" in the light of all the facts and circumstances then existent—in view of the expiration in 1931 (Sec. 19, Act April 26, 1906, 34 Stat. L. 137), of all restrictions upon his lands and money—in view of the security to him by the trust arrangements provided for in the two transfers—of an income during his natural life of ample funds to keep him in ease and luxury ($27,500 annually)—whether provision for the security of Barnett's wife made before his death was

for his benefit—whether placing in her hands for her unrestricted use ample funds with which she might purchase a comfortable and permanent home for Barnett were to be considered in the determination of the question of "the best interest of the Indian," were properly within the exclusive judgment of the Secretary—he was of course in possession of all the facts and circumstances upon which to act.

The policy therefore which governed the determination by the Secretary of the questions thus presented to him was for his department to determine, and not for the Department of Justice. And to the same effect is it also a policy of the Interior Department to determine whether litigation shall be instituted to set aside or modify the official action of that department, except with this qualification, that where fraudulent official action has been taken by the Secretary of the Interior or other official, then it is within the authority of the Department of Justice to determine.

At no time during the Barnett litigation has the Department of Justice felt itself safely grounded upon a question of policy relative to that department's action. This is reflected in the opinion of March 4, 1929, upon the report of Mr. Pierce Butler, from which we quote:

> "There is a question of policy that is not for my determination but which should be pointed out. If the wife survives the Indian, she will inherit his property free of restrictions, if there be no testamentary disposition otherwise. * * * Therefore, the public good that was served by the recovery from the Mission Society of the gift for the benefit of the Indian School

is obscure, as the situation now is. That a useful purpose is served by expenditures for the recovery and addition to the Indian's estate of the other gifts for the wife to inherit in all probability in a few years is at least a question. It is reasonably certain that if the marriage be annulled and the wife cannot inherit there will be attracted many claimants on the ground of heirship. Expensive, speculative and protracted litigation will ensue. At last the benefit any Indian would receive from the estate would be doubtful."

Conclusion.

The array of *Barnett* cases, as shown by the record in No. 530, *United States* v. *Equitable Trust Company, et al.*, had their origin in the contingent fee contracts executed in 1923 between certain alleged relatives, who claimed to be prospective heirs of Barnett, and the law firm of Cochran & Ellison, and C. B. McCrory, attorneys at Okmulgee, Oklahoma. A copy of this contract appears on pages 152-153 of record in said cause.

Coupled with that contract, of course, is the later contingent fee contract by Bailey, alleged next friend of Barnett, who then claimed to be the legal guardian of Barnett in Oklahoma, with the law firm of Hummer & Foster of Henryetta, Oklahoma. A copy of this contract appears in the same transcript, pages 127-130.

These attorneys initiated the suits in the beginning. Later, the Department of Justice entered into the suits, first by intervention in the New York and Washington cases, later in other jurisdictions.

The story of how the Department of Justice came into the cases is revealed by the affidavits of Mr. Carroll G. Walter (Trans. No. 530, pp. 101-113, 154-158), Mr. Rayburn L. Foster (Trans. same case, 113-127), and Mr. Almond D. Cochran (Trans. same case, 137-141, 158-160), who are the leading counsel in the suits filed in New York and Washington by Bailey, next friend.

A reading of these statements reveals a most unusual and extraordinary situation in inter-Departmental administration. These statements, which are admittedly true, reveal a complete departure by the Department of Justice from its time honored rules—that opinions of that department would only be written upon the request of heads of other departments, regularly submitted, and then only upon matters which might then be pending before said department for official action; and—that no suit or proceeding by the Department of Justice would be initiated or prosecuted, in any court, save upon the official request of the President, a head of another department or by direction of Congress.

Here the interventions were induced by the activities and influence of private persons contrary to the official requests, and even protests of the Secretary of the Interior. (See especially statements of Mr. Cochran, on pages 139-140.) It there appears, and is true, that even after the Department of Justice had filed answers for the Secretary of the Interior and Commissioner of Indian Affairs in the suits filed by Mrs. Bennett, in which answer was pleaded the validity and regularity of the acts of the Secretary in the

Barnett gifts and transfers, these gentlemen representing private persons induced the Department of Justice to change its course of action therein, and without the consent of said officials withdrew said answers from the files in the New York case aforesaid, and intervene in the New York and Washington cases attacking the action of the Secretary and Commissioner as unwarranted and unlawful. It appears that tremendous pressure was being brought by the Interior Department to induce the Justice Department to either stand back of the Secretary or withdraw from the suits. Questions of policy were discussed, which Mr. Cochran states "tended to delay and impede any action by the Government in behalf of the plaintiff." Notwithstanding all this opposition these attorneys prevailed with the Department of Justice over the Secretary and one of the important items for which counsel claimed compensation in that case, was for inducing the Department of Justice to inter into the suits on their side and in keeping that department on their side and against the Secretary—thus, in the language of Mr. Cochran (Tr. 159):

> "In brief, after the Government was in the case, I performed a vast amount of services in attempting to keep it in the case on the side of the plaintiff."

And again quoting from Mr. Walters' affidavit (Tr. 112):

> "That the Department of Justice finally intervened in the case on the side of the plaintiff and assisted in its prosecution is due entirely to the strenuous efforts of counsel for the plaintiff, Mr. Cochran and Mr. Foster, as is more fully set forth in their affidavits, to which reference is hereby made."

Doubt and uncertainties beset the Department of Justice throughout its whole course in this litigation. Undoubtedly, by reason of the pressure and influence of the attorneys representing Bailey the Department of Justice was first induced to incorporate implications and charges of fraud on the part of the Secretary and Mr. Burke, but later, because of a complete absence of evidence to support such, these charges and implications were withdrawn at the New York trial by order of Attorney General Sargent. Mr. Cochran states in his affidavit (p. 159, *supra)* that he participated in the preparation of the Government's brief filed in the District Court after the trial, and that by reason of these withdrawals the attorneys preparing same were hampered and embarrassed and as he stated:

> "Most of the time was devoted to efforts to phrase something which would enable the Government to stay in court at all, without violating the limitations which had been placed upon those engaged in the preparation of the brief."

The history of the *Barnett* litigation reveals a complete lack of faith in the form and theory of the different bills and amendments filed in all cases by the Department of Justice. Its repeated abandonment of one theory and allegation and the adoption of others, adds to the weakness of the Government's position herein.

As was expressed by Mr. Butler, in his report to the Attorney General touching the various *Barnett* suits, as to the wisdom and propriety of the further prosecution of those actions—it is clear that that department itself now

doubts the wisdom or the propriety of their prosecution—so there never has been a moment of time since the Department of Justice entered these cases that it has been firmly grounded either in the wisdom or the propriety of its action or the soundness of its claims in that behalf.

Its contention here—is as revolutionary as its policy. It will be fatal to the exercise by the Secretary of discretionary judgment in Indian matters if the contention of the Department of Justice be here upheld.

If this court holds that the lack of understanding or, in other words, mental qualification of Barnett, as alleged in the second amended bill, qualified the power and authority of the Secretary in the administrative exercise of his judgment and discretion relative to the restricted income from the Indian's oil and gas lease, and that his judgment is subject to be reviewed by the courts, as here attempted, then the usefulness of said official will be at an end in Indian affairs, and the conduct of Indian affairs will be transferred to the courts.

It is claimed here that the action of the Secretary was an abuse of discretion. That is all that the claims of the Department of Justice amounts to and in its last analysis that is all that the Circuit Court of Appeals held. That claim is completely answered by the words of this court in a recent decision, *Wilbur v. U. S., ex rel. Kadrie,* 74 L. ed. 441, Adv. Opin. No. 10, p. 441, 1929, relating to the authority of the Secretary of the Interior in certain Chippewa Indian matters in a suit assailing his action, thus:

"But in the last analysis, this is a mere argument, seeking to destroy a lawful power by the suggestion of a possible abuse."

This court, therefore, should reverse the judgment and order of the Circuit Court of Appeals, and sustain the judgment of the District Court dismissing the suit.

Respectfully submitted,

CHAS. B. ROGERS,
Tulsa, Oklahoma,
Attorney for Petitioner.

Appendix "A."

Interior Dept. Received Dec. 11, 1926. Office of the Secretary.

Department of Justice.
Office of the Attorney General.
Washington, D. C.

Hon. Hubert Work, December 11, 1926.
Secretary of the Interior,
Washington, D. C.

My dear Mr. Secretary: In accordance with your informal request, submitted through Assistant Secretary Edwards, there is enclosed herewith copy of the memorandum of October 20, 1926, prepared by Mr. George P. Barse of this department, referred to in a letter of October 22, 1926, sent by me to the United States Attorney in New York City in connection with a suit of *Jackson Barnett* v. *Equitable Trust Company, et al.* The view therein expressed with reference to the amendment of October 7, 1922, of the regulation of the Secretary of the Interior relating to the disposal of proceeds of oil and gas leases of restricted lands of members of the Five Civilized Tribes, is my present view. A copy of the letter of October 22, 1926, and also of a letter of a similar nature, of October 26, 1926, to the United States Attorney in New York, have already been furnished to you by my letter to you of October 26, 1926.

I am sending you by separate mail a reply to your letters of October 4 and November 3, 1926, requesting my opinion as to the authority of the Secretary of the Interior to disburse restricted funds of allottees of the Five Civilized Tribes in cases where guardians of incompetents have been appointed.

Respectfully,

Jno. G. Sargent,
Attorney General.

Inc. 52474

Washington, D. C.,
October 20, 1926.

MEMORANDUM FOR THE ATTORNEY GENERAL.

In re: Question of whether or not the amendment of October 7, 1922, of the regulations of the Secretary of the Interior, relating to disposal of proceeds of oil and gas leases of restricted lands of the members of the Five Civilized Tribes could lawfully be made.

The Amendment of October 7, 1922.

"And *provided further*, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases."

Preliminary Observation.

There appears to be no case in point on this question and therefore it becomes necessary to decide it by a process of reasoning from established principles. This will be done by the statement of a series of basic propositions and the conclusion therefrom derived.

Propositions.

1. *Power and Authority of Congress.* The power and authority of Congress to impose restrictions upon the lands of the Five Civilized Tribes, provide for the removal of those restrictions and the disposal of the proceeds, for the benefit of the Indian, is no longer open to question. The right of exclusive legislation in this respect was reserved in

section 1 of the Oklahoma Enabling Act, and was acquiesced in by the state. The restrictions imposed upon the lands of these Indians was a continuance of the exercise by the United States of its guardianship and protection over the Indians and the issuance of allotments and the granting of citizenship "was in no wise inconsistent with the retention of control *over the disposition of the allotted lands* * * *" *Heckman* v. *United States*, 224 U. S. 413, 436; *Bowling* v. *United States*, 233 U. S. 528.

2. *Action of Congress.* Section 1 of the Act of May 27, 1908, provides that the Secretary may remove restrictions under such terms and conditions as to sale and as to disposal of the proceeds as may be embraced in regulations made by him, *for the benefit of the Indian.*

Section 2 of that act provides for oil and gas leases of these restricted lands under such rules and regulations as may be made by the Secretary of the Interior. Although the latter provision, as to leases, does not specifically state that such rules and regulations shall embrace the control of the disbursement of the moneys thereby derived, yet of course it necessarily follows that such must be part of the purpose of the trust thereby imposed in order that complete protection may be afforded to the Indian lessor. *United States* v. *Brown*, 8 Fed. (2d series) 564.

3. *Nature of Proceeds.* From the foregoing (points 1 and 2, *supra*), it follows:

(a) That the moneys derived from the leasing of restricted lands constitute a *federal* fund, the administration of which is a trust for the benefit of the Indians. *United States* v. *Thurston County*, 143 Fed. 237; *United States* v. *Brown*, *supra*.

(b) That the State of Oklahoma cannot pass any law interfering in any way with that administration, and that guardians of Indians appointed under state law can neither

demand from the federal government the payment to them of such funds so held, nor in any way direct or dictate their disposal contrary to the will of Congress.

Section 2 of the Act of May 27, 1908, specifically provides, as to the approval of the Secretary of the Interior of oil and gas leases of restricted lands, and the power to make rules and regulations concerning the same, that

> "the jurisdiction of the Probate Courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions * * *."

4. *Procedure Prescribed for Administration.*

(a) It is clear that Congress could have *specifically* indicated the precise disposition of proceeds from the sale or leasing of restricted lands for the benefit of the Indian, and could have directed that said funds be disbursed by the Secretary at a specified sum per month direct to the Indian, or by the Secretary disbursed for the support and maintenance of the Indian in other respects than by payments direct to him, and as to such disbursement it is clear the laws of Oklahoma and the guardians appointed under those laws could have no effect whatever. The existence of guardianship does not prevent the creation of a separate trust, the administration of which is beyond the control of the guardian. There is no necessary conflict.

(b) Congress saw fit to accomplish its purpose of protection of the Indians by creating a trust, by sections 1 and 2 of the Act of 1908, and vested the administration of it in the Secretary of the Interior *without specific limitations* of the manner in which he might administer. Hence, the power so conferred is broader than any powers which might have been specifically conferred.

(c) It follows that the regulations made by the Secretary, in his judgment and discretion in the administration

of his trust, the necessity of those regulations, their effectiveness to accomplish their purpose, and his acts in the control and disbursement of said funds in accordance with said regulations, cannot well be questioned, as indicated by well settled general principles, unless there is an abuse or arbitrary exercise of that discretion. *Wade* v. *Fisher*, 39 App. D. C. 245, 248; *United States, ex rel. Lane*, v. *Sykes*, 49 App. D. C. 48.

5. *Same—Decisions Defining the Secretary's Powers of Administration.*

(Here follow quotations from *United States* v. *Brown, et al., supra*, see same on page 14 of brief; also *United States* v. *Hinkle, supra*, see same, brief, page 20, and *Parker* v. *Richard, supra*, see same, brief, page 20.)

6. *Validity and Purpose of the Amendment of October 7, 1922, to Regulation 24.*

As section 2 of the Act of 1908 specifically grants the Secretary power to make rules and regulations as to oil and gas leases, it follows that the amendment to the rule in question is within his power unless, as already indicated, it constitutes an arbitrary exercise of or abuse of his discretion. (See discussion under point 4 hereof.)

It will now be sought to be shown that the amendment is reasonable in purpose and operation and designed to accomplish the true protection of the *cestui que* trust.

(a) The responsibility for the administration of the trust has been placed by Congress upon the Secretary as its agent. (*Wade* v. *Fisher*, 39 App. D. C. 245, 248.) It follows that whether he will delegate a portion of his functions to a state guardian, to some other agency, or exercise it himself, must be a matter solely in his discretion. The responsibility carries with it the accountability.

(b) Experience has demonstrated that abuses in administrations of such trust funds sometimes occur where the

Secretary surrenders control of the disbursement to a state guardian, and that a course of unvarying delegation of the administration of such trust to the state guardian is unwise and not for the best interests of the Indian beneficiaries, as was formerly the procedure under Rule 24 prior to its amendment. It is no answer to say that the state guardians are accountable to the state courts. The responsibility for delegating the trust to the state guardian is in the Secretary and he must determine whether or not, in a particular case, he considers it wise to entrust such funds to the appointed guardian.

(c) The amendment does not *preclude* delegation to the state guardian of partial administration of the trust, and does not supersede or repeal original section 24 of the regulations. It supplements section 24, and makes possible a flexible administration, susceptible of rendering the best protection to the interests of the Indian beneficiary. Under section 24 and the amendment, the Secretary may pay reasonable amounts direct to the Indian where exigency or circumstances seem to render it advisable; may disburse funds to other persons for the benefit and immediate use of the Indian; may entrust substantial amounts to the state guardian, with or without restrictive conditions as to disbursement and supervision, and, in a word, exercise direct supervision and administration of his trust, or not, as his best judgment dictates.

Can there be any question under the foregoing observation, as to the reasonableness of purpose and function and operation of the amednment to section 24?

7: *Consent of Indian Allottee.*

(a) It is clear that under section 2 of the Act of 1908 the Indian has the *option of refusing to lease* his lands if he is not satisfied that the proceeds to be derived therefrom shall be subject to disposal by the Secretary in accordance

with the regulations in that connection made by the Secretary, and in the event of such refusal he may retain his lands intact for the restrictive period imposed by Congress, and his rights will not in that event be violated because he still holds his lands and has the use of them.

(b) No disposal of such proceeds is made by the Secretary without the consent of the Indian lessee. Such consent is, as a matter of fact, actually obtained *in advance* by the Secretary before he approves the proffered lease. Every lease executed contains a provision that the lease is made subject to the rules and regulations of the Secretary of the Interior relating to the leasing of said lands. Up until July 7, 1925, the provision inserted in all oil and gas leases was as follows:

> "This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease."

Since that time a similar provision is inserted, which is as follows:

> "*Provided.* During the period supervision hereof is retained by the Secretary of the Interior, this instrument shall be subject to the supervisory regulations of said Secretary."

(c) Where the Indian is *sui juris* he, himself, consents by his signature to the lease, and it will be noted in this connection that section 6 of the Act of 1908 provides for the appointment of repreesntatives of the Secretary of the Interior, whose duties, *inter alia*, shall be "to counsel and advise all allottees, *adult or minor*, having restricted lands, of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made * * *."

If the Indian is under guardianship, consent is given by the guardian in executing the lease and by the state court in authorizing the execution of the lease.

(d) Although it has been the custom and practice of the Secretary, purely as a matter of precaution, to incorporate in the lease specific reference to the regulations, and by that reference expressly make the regulations part of the lease, yet it is believed that such regulations would become part of the lease even though specific reference thereto were not made in the lease. The Indian lessor is, of course, *charged with notice* of the provisions of section 2 of the Act of 1908 to the effect that all leases must be made subject to the rules and regulations of the Secretary. Hence, it follows that the act of making the lease is an adoption of and acquiescence in such regulations as may be made.

With reference to the rules of the Secretary of the Interior the Supreme Court said in *Caha* v. *United States*, 152 U. S. 211, 222, as follows:

> "Wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

There is thus no legal basis for either the Indian or his guardian, or the state court, to question the regulations, inasmuch as the consent of the Indian to the operation of the regulations attaches in advance, either by express provision in the lease or by implication of law from the fact of execution of the lease.

Conclusion.

I am therefore clearly of the opinion that the amendment of October 7, 1922, to section 24 of the regulations is a valid exercise by the Secretary of the authority conferred upon him by section 2 of the Act of 1908, to make rules and regulations concerning oil and gas leases of restricted Indian lands.

Respectfully submitted,

George P. Barse, Attorney.

Appendix "B."

Extract from opinion of attorney general of October 5, 1929, concerning power of Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"* * * Congress, however, has for many years placed supervision over Indian affairs in the Secretary of the Interior, as indicated in the Act of March 3, 1849 (9 Stat. 395), and sections 441 and 463 of the Revised Statutes of 1878. * * * Under these statutes, the Secretary of the Interior was not empowered to consent to the release of the restrictions thus imposed. Later, however, Congress passed statutes which permitted the removal of certain restrictions, subject to the approval of the Secretary of the Interior. * * *

"The Secretary has the power to remove restrictions from certain Indian funds. * * * Upon the removal of such restrictions from any fund, and the release of the fund to the Indian, the Indian may use the fund as he sees fit, and if he desires to create a private trust of it by agreement with the trust company, I know of no legal objection to his doing so. * * *"

Appendix "C."

Extract from the opinion of the solicitor for the Interior Department, dated June 26, 1929, concerning power of the Secretary to unconditionally remove restrictions from trust funds belonging to individual Indians:

"These all indicate that the Secretary of the Interior stands largely in the capacity of a *quasi* or *de facto* guardian in the protection of restricted Indians and of their property." (c-8)

"* * * the power and duties so resting in the Secretary of the Interior cannot well be transferred or delegated to any other agency, state or federal. Admittedly, the creation of a trust estate out of restricted Indian funds would lodge in some other tribunal or agency future supervision or control over such funds. From time to time under statutory authority hereinbefore referred to, Congress has authorized the Secretary of the Interior to remove restrictions * * *. When such action is had, Indians so situated can thereafter make such disposition of their property previously restricted, by creation of trust estates, or otherwise, as they may see fit to do. (p. c-9) * * *"

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No. 78

In the Supreme Court of the United States

OCTOBER TERM, 1929

MARSHALL L. MOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for not opposing the petition	4

CITATIONS

American Baptist Home Mission Society v. *Barnett*, 278 U. S. 626	6
Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325, 332	6
Equitable Trust Co. v. *United States*, 34 F. (2d) 916	6
Act of May 27, 1908, c. 199, 35 Stat. 312	2

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 810

MARSHALL L. MOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 68) is reported in 37 F. (2d) 860.

The opinion of the United States District Court for the Northern District of Oklahoma (R. 55) is reported in 33 F. (2d) 340.

JURISDICTION

The decree of the Circuit Court of Appeals was entered February 3, 1930. (R. 72.) Petition for certiorari was filed April 11, 1930.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

If the merits of the question can now be considered, the question involved is whether the Secretary of the Interior had the power, under the Act of May 27, 1908, c. 199, 35 Stat. 312, to approve, so as to render valid, gifts by a mentally incompetent full-blood member of the Creek Tribe of Indians, which is one of the Five Civilized Tribes in Oklahoma, of the greater part of the Indian's restricted property, the gifts amounting in value to more than $1,000,000.

Incidental to the determination of that question are the questions: (1) whether such a disposition of the Indian's restricted property was for the benefit of the Indian within the meaning of Section 1 of the Act, and (2) whether the Secretary of the Interior could validly approve such disposition of the Indian's property where the Indian was incompetent to initiate the making of the gifts on account of his lack of mental capacity and his inability to understand what he was doing.

STATEMENT

This suit was brought by the United States against the petitioner in the United States District Court for the Northern District of Oklahoma to recover bonds of the par value of $15,000, or the proceeds thereof, given to petitioner by Anna Laura Barnett, the alleged wife of Jackson Barnett, in connection with alleged gifts of bonds by Jackson Barnett of the par value of $1,100,000. Half of

the $1,100,000 worth of bonds were transferred to Anna Laura Barnett by the Secretary of the Interior and half to the Equitable Trust Company in trust for certain institutions, following the approval by the Secretary of the Interior of the instrument of gift, thumb-marked by Barnett and set out at pages 22–25 of the record.

The original bill of complaint does not appear in the record. An amended bill of complaint was filed, which petitioner moved to dismiss. (R. 1, 34.) While this motion was pending, the United States applied for leave to file a second amended bill of complaint. (R. 44.) This second amended bill of complaint alleged, among other things, that Jackson Barnett is an aged full-blood member of the Creek Tribe of Indians (R. 46–47); that the bonds involved were purchased by the Secretary of the Interior with money derived from oil and gas royalties from Barnett's restricted allotment (R. 47–48); that Barnett at the time of making the instrument of gift was unable "to read or write any language, or to understand elementary arithmetic, or to readily comprehend the English language, nor by reason of his mental infirmity was he able to appreciate the nature, or amount of his property, or to realize the portions of it so disposed of and distributed, nor was he, at the times complained of, able to understand, and at no time since has understood, the terms and conditions upon which the said delivery of said bonds was made by the said Secretary of the Interior" (R. 49–50);

and that the petitioner, before and at the time of the receipt of said bonds, had actual knowledge of all the facts and circumstances relative to Barnett's mental incompetency, the source from which said bonds were derived, and the restrictions imposed thereon. (R. 50–51.) The District Court refused to allow the second amended bill to be filed and dismissed the case, on the ground that the bill did not state a cause of action. (R. 55–58.)

On appeal the Circuit Court of Appeals held (R. 68) that the gift to Anna Laura Barnett, evidenced by the thumb-marked request of Barnett (R. 22–24), was not for Barnett's benefit and not within the power of the Secretary of the Interior to approve under the authority vested in him by Section 1 of the Act of May 27, 1908. The court accordingly reversed the decision of the District Court and remanded the case to that court with directions to reinstate the suit and permit the United States to file its second amended complaint. (R. 68–72.)

REASONS FOR NOT OPPOSING THE PETITION

We think that the decision of the Circuit Court of Appeals was right, and that there is no conflict between that decision and any of the decisions of this Court or of any other Circuit Court of Appeals. Furthermore, the judgment sought to be reviewed remands the case to the District Court with directions to reinstate the suit and to permit the United States to file its second amended com-

plaint, and is thus interlocutory in character. (R. 72.) Under ordinary circumstances we should oppose a petition for a writ of certiorari in such a case. We do not oppose the granting of the writ in this case because we believe a determination by this Court of the questions decided in the Court below will lead to a speedy determination of burdensome litigation pending in several of the District Courts.

There are now pending in the United States District Courts for the District of Kansas and the Southern District of California and in the Supreme Court of the District of Columbia the following suits: (1) against Harold C. McGugin, who received part of the bonds given Anna Laura Barnett (R. 50), to recover the same, or the proceeds thereof; (2) against Anna Laura Barnett to recover the bonds which she retained out of the gift to her or the property in which the proceeds were invested; and (3) against the Riggs National Bank to recover bonds of the par value of $200,000 placed in trust in that institution (R. 24–25), or the proceeds thereof. In so far as the validity of the gifts and the effect of the approval thereof by the Secretary of the Interior is concerned, the pleadings on behalf of the United States are substantially the same as that in the instant case, except that in the California case additional equitable relief is prayed on the ground that Anna Laura Barnett, the alleged wife of Jackson Barnett, is not entitled to any prop-

erty rights in his estate by reason of a marriage contract which the Government contends is void.

In the case of *Barnett* v. *Equitable Trust Co.*, 21 F. (2d) 325, 332, the District Court for the Southern District of New York set aside a gift of half of the bonds on the ground that Barnett did not have sufficient mentality to comprehend what he was doing when he made the gift. Although the court gave a different reason for its decision, the result reached in that case was the same as that reached by the Circuit Court of Appeals in the instant case. An appeal from the decision was dismissed by the Circuit Court of Appeals for the Second Circuit because of the failure of the appellant to procure an order of severance as to its codefendant. 26 F. (2d) 350. Certiorari was refused by this Court. (*American Baptist Home Mission Society* v. *Barnett*, 278 U. S. 626.)

Thereafter, this Court granted certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Equitable Trust Co.* v. *United States*, 34 F. (2d) 916, which is now pending before this Court. (No. 530.) That case grew out of the case mentioned in the preceding paragraph, and involves the question whether the courts have power to allow the payment of counsel fees out of the restricted property of Barnett.

If this Court should now review the question whether the second amended bill of complaint in

the instant case states a cause of action, its decision would materially aid in the disposition of the other pending suits involving portions of this same Indian trust fund.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

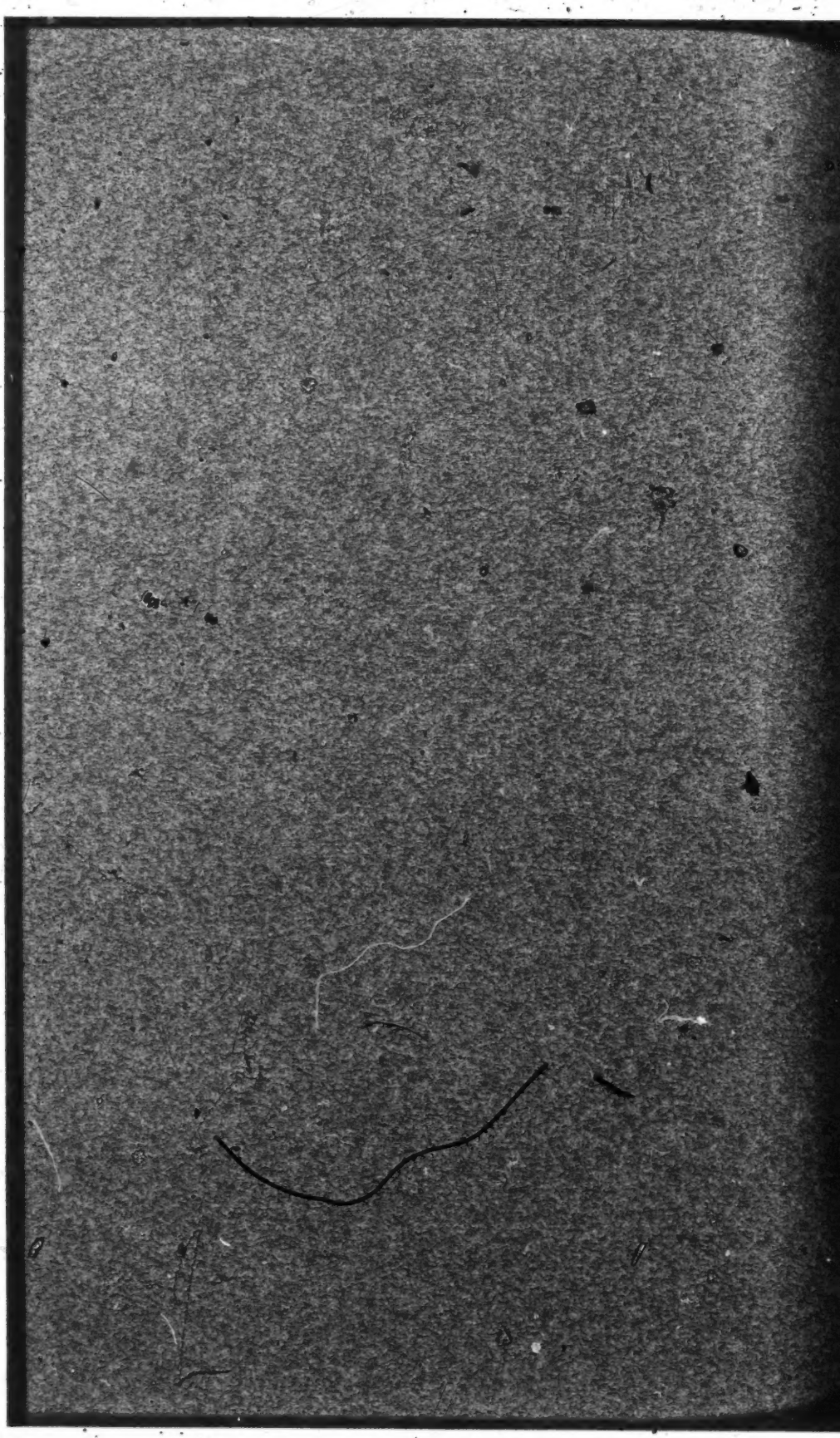
SETH W. RICHARDSON,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

NAT M. LACY,
W. MARVIN SMITH,
Attorneys.

MAY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930



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No. 78

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MARSHALL L. MOTT, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES ON PETITIONER'S MOTION TO ADVANCE

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The United States does not oppose the motion to advance this cause.

However, it is believed attention should be called to an erroneous assumption in the motion, namely, that the case of the *United States* v. *Equitable Trust Company et al.*, No. 21 on the docket of the present term of this Court, involves the same question as the instant case of *Mott* v. *The United States*, No. 78. The former case involves only the question of the power of the court below to order allowances of attorneys' fees to be paid out of Jackson Barnett's restricted Indian funds. It is true that originally there was involved in that case the same fundamental question as is involved in the *Mott*

case, as to the authority of the Secretary of the Interior to approve and validate the gifts purported to have been made by Jackson Barnett. But in *Barnett* v. *Equitable Trust Company, et al.*, 21 F. (2d) 325, in which the United States intervened, it was finally determined that the Secretary had no such authority. Appeal was dismissed in the Circuit Court of Appeals, 26 F. (2d) 350, and certiorari denied, 278 U. S. 626. The question regarding the power of the court to make an allowance of counsel fees out of restricted Indian funds involved in *United States* v. *Equitable Trust Company, et al.*, No. 21 on the docket, arose after the final determination of the case on the merits by the court below, and is now the only question in that case to be decided by this Court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
SETH W. RICHARDSON,
Assistant Attorney General.
GEORGE C. BUTTE,
Special Assistant to the Attorney General.

OCTOBER, 1930.

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
I. The distribution of a large portion of Jackson Barnett's bonds to his alleged wife, followed immediately by the delivery of part thereof to the petitioner, was not for Barnett's benefit within the meaning of the act of May 27, 1908. Such distribution was therefore invalid and did not transfer Barnett's right or title to the bonds	10
II. The purported gift of Barnett's bonds to his alleged wife was invalid because of his lack of mental capacity to make a gift. The approval of the transaction by the Secretary of the Interior did not make the gift valid	20
III. Since the petitioner received the bonds with notice of the facts alleged in the complaint and the mental incompetency of Barnett, he acquired no title or right thereto	33
Conclusion	34
Appendix	35

CITATIONS

Cases:	
Barnett v. *Barnett*, 121 Okla. 142; 122 Okla. 160; 122 Okla. 169	4
Barnett v. *Equitable Trust Co.*, 21 F. (2d) 825	26
Binney v. *R. I. Hospital Trust Company*, 43 R. I. 222	33
Choate v. *Trapp*, 224 U. S. 665	12
Conners v. *Murphy*, 109 N. J. Eq. 280	20
Crosbie v. *Brewer*, 68 Okla. 16	28
Decatur v. *Paulding*, 14 Pet. 497	18
Flagler, Matter of, 248 N. Y. 415	31
Garfield v. *Goldsby*, 211 U. S. 249	18, 19
Gibson v. *Collins*, 4 F. (2d) 874, certiorari denied, 267 U. S. 605	20, 27–28

Cases—Continued. Page

Hampton v. *Ewert*, 22 F. (2d) 81, certiorari denied, 276 U. S. 623 23
Heckman v. *United States*, 224 U. S. 413 13
Hemmer v. *United States*, 204 Fed. 898 18
Holmes v. *United States*, 33 F. (2d) 688 23
Jennings v. *Wood*, 192 Fed. 507 ..... 23, 28
Lane v. *Hoglund*, 244 U. S. 174 18
Le Bourgeois, In re, 144 La. 501 31
Midland Oil Co. v. *Turner*, 179 Fed. 74 23
Moore v. *Smith*, 182 Fed. 540, certiorari denied, 219 U. S. 587 31
Parker v. *Richard*, 250 U. S. 235 10
Polt v. *Polt*, 205 Pa. 189 20
Santa Fe Pacific R. R. Co. v. *Fall*, 259 U. S. 197 18
Sawyer v. *White*, 122 Fed. 223 20
Schrimpscher v. *Stockton*, 183 U. S. 290 12
Snavely v. *Henderson*, 204 Fed. 978 20
Sunderland v. *United States*, 266 U. S. 226 ..... 10, 14, 24–25
United States v. *Brown*, 8 F. (2d) 564, certiorari denied, 270 U. S. 644 10
United States v. *Brown*, 15 F. (2d) 565 ..... 23, 29
United States v. *Hinkle*, 261 Fed. 518 10
United States v. *Paine Lumber Co.*, 206 U. S. 467 12
Work v. *Louisiana*, 269 U. S. 250 18

Statutes:

United States Statutes—
Act of March 3, 1893, c. 209, 27 Stat. 612, 645 11
Act of April 26, 1906, c. 1876, Sec. 19, 34 Stat. 137, 144 12
Act of May 27, 1908, c. 199, 35 Stat. 312, 313—
Sec. 1 ..... 2, 10, 12, 35
Sec. 2 35
Sec. 5 35
Act of May 10, 1928, c. 517, 45 Stat. 495 36

Treaties:

Original Creek agreement, approved March 1, 1901, c. 676, 31 Stat. 861, 883 12
Supplemental Creek agreement, approved June 30, 1902, c. 1323, 32 Stat. 500, 506 12

Regulations:

Section 24, Interior Department regulations governing leasing, removal of restrictions, etc., on lands of members of the Five Civilized Tribes, issued March 8, 1921 36–38
Amendment to section 24 of the regulations of March 8, 1921, issued October 7, 1922 38

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 78

MARSHALL L. MOTT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Oklahoma (R. 60) is reported in 33 F. (2d) 340. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 71) is reported in 37 F. (2d) 860.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 3, 1930. (R. 76.) Certiorari was granted May 19, 1930. Jurisdiction is conferred upon this Court by Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior is empowered to dispose of restricted trust funds of a full-blood adult Creek Indian by approving a gift thereof to third persons, in view of the provisions of Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, which prohibits any such disposition unless the same is for the benefit of the Indian owner.

2. Whether the Secretary of the Interior is empowered to dispose of restricted trust funds of a full-blood adult Creek Indian by approving a gift thereof to third persons, when the Indian owner is so mentally incompetent that he is wholly incapable of managing his affairs, of understanding the nature or extent of his property, or of intelligently disposing of the same.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and Regulations of the Department of the Interior are set forth in an appendix to this brief, pp. 35–38, *infra*.

STATEMENT

The United States brought suit in the District Court on behalf of Jackson Barnett, a full-blood Creek Indian, to recover from the petitioner United States bonds in the face value of $15,000, or their proceeds or value if they had been converted, and for an accounting. These bonds had formerly been

held in the United States Treasury under the control of the Secretary of the Interior as restricted funds of Jackson Barnett.

The original bill of complaint is not shown in the record. An amended bill of complaint was filed on September 13, 1928, together with various supporting exhibits. (R. 1–37.) The petitioner moved to dismiss the amended bill on the ground, among others, that it did not state a cause of action against the petitioner. (R. 38–47.)[1] While this motion was pending (R. 47) the United States applied for leave to file a second amended bill of complaint. (R. 48–50.) The petitioner objected to the filing of the same on the ground, among others, that it did not show any cause of action against the petitioner. (R. 58–59.) The District Court, treating the objections to filing the second amended bill as a motion to dismiss, held that it failed to state a cause for equitable relief and thereupon denied the application of the United States to file the second amended bill and dismissed the suit. (R. 60–64.) Upon appeal the Circuit Court of Appeals reversed the judgment of the District Court, with directions to reinstate the suit and permit the United States to file

[1] The amended bill of complaint charged a *fraudulent combination* between Anna Laura Barnett, the purported wife of Jackson Barnett, and her attorneys, Harold C. McGugin and Marshall L. Mott, and A. J. Ward, Creek National Attorney, to procure the release of Jackson Barnett's restricted bonds and funds in the custody of the Secretary of the Interior, and to procure the delivery thereof, or of a portion thereof, to Anna Laura Barnett. (R. 1–22.)

its second amended complaint. (R. 76.) Its decree to this effect, filed February 3, 1930, is here for review. (R. 76.)

The second amended bill of complaint alleges the following facts:

That Jackson Barnett is an enrolled, full-blood member of the Creek Tribe of Indians, one of the Five Civilized Tribes of Oklahoma; that as such member of said tribe there was duly allotted to him his proportionate share of the tribal lands, these lands being located in the State of Oklahoma; that Jackson Barnett is about seventy-eight years of age, and is without issue; that at all times therein mentioned he was, and now is, illiterate, mentally incompetent, and wholly incapable of managing his affairs, or of caring for his property and person, and unable to appreciate or understand the nature or extent of his property. (R. 50-51.)

That in 1912 a guardian of the person and estate of Jackson Barnett was appointed by the County Court of Okmulgee County, Oklahoma, in which county Barnett then resided; that this guardian, or his successor, was thereafter duly recognized as such by the courts of Oklahoma and of the United States, the Department of the Interior, and by all the persons mentioned in the second amended bill of complaint, until November 30, 1926, when the Supreme Court of Oklahoma held his appointment to be invalid. (R. 51.)[1]

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[1] See *Barnett v. Barnett*, 121 Okla. 142; 122 Okla. 160; 122 Okla. 169.

That in 1912 an oil and gas lease of the land allotted to Jackson Barnett was executed by Barnett and his guardian and approved by the said County Court and the Department of the Interior, from which lease royalties accrued and were transmitted to the Secretary of the Interior as the property of Barnett; that by February 1, 1923, such royalties had accumulated in the amount of $1,156,750, which royalties had been invested in United States bonds by the Secretary of the Interior, and deposited in the Treasury of the United States. (R. 51–52.)

That on or about February 1, 1923, Albert B. Fall, then Secretary of the Interior, having shortly prior thereto requested of and received from the Treasury of the United States $1,100,000 par value of these bonds, caused $550,000 par value thereof to be delivered to the Equitable Trust Company, of New York, as trustee, upon trust to pay from the income thereof $20,000 annually to Jackson Barnett so long as he should live, and the remainder of the income thereof during the life of Jackson Barnett and all of the income thereof thereafter to certain uses of the American Baptist Home Mission Society of New York; that at the same time and as part of the same transaction, Albert B. Fall caused to be delivered to one Anna Laura Barnett, the purported wife of Jackson Barnett, the remaining $550,000 par value of these bonds, under an agreement whereby Anna Laura Barnett should cause $200,000 par value of these bonds to be placed in trust with the Riggs National Bank, of Wash-

ington, D. C., to pay from the income thereof $7,500 annually to Jackson Barnett so long as he should live and to pay the remainder of the income during the life of Jackson Barnett to Anna Laura Barnett, and upon the death of Jackson Barnett to pay all of the income and, from time to time thereafter, portions of the principal thereof to Anna Laura Barnett or to her daughter, Maxine Sturgis, until the entire trust fund should be paid to Anna Laura Barnett or her daughter; that the remainder of the bonds so received by Anna Laura Barnett were to become her sole and unrestricted property; that the agreement upon which the $200,000 par value of the bonds were delivered to Anna Laura Barnett was duly performed by her. (R. 52–53.)

That the annual interest on the bonds delivered to the Equitable Trust Company and to Anna Laura Barnett was in excess of $50,000. (R. 53.)

That at no time was Jackson Barnett able to read or write any language, or to comprehend readily the English language, or to understand elementary arithmetic; that by reason of his mental infirmity he was unable to appreciate or understand the nature or extent of his property, and at no time has he understood, or been able to understand, the terms and conditions on which the delivery of the bonds was made by the Secretary of the Interior. (R. 53–54.)

That the delivery of the bonds by the Secretary of the Interior was based upon a purported request

in writing bearing the thumb-print signature of Jackson Barnett, the nature, purpose, and effect of which he was and at all times has been wholly unable to comprehend and understand; that the said writing was drafted by one A. J. Ward, then Creek National Attorney, which writing, together with letters from Ward and the Commissioner of Indian Affairs, containing recommendations that Albert B. Fall authorize the deliveries of the bonds in accordance with the thumb-print instrument of request, were transmitted to Albert B. Fall; that these letters contained the statement that Jackson Barnett had been adjudged an incompetent by the County Court of Okmulgee County, Oklahoma, and that a guardian had been appointed of the person and the estate of Jackson Barnett, and was then acting as such. (R. 54.)

That the deliveries of said bonds and the execution of the purported thumb-print request were without notice to the guardian of Jackson Barnett, or to the County Court of Okmulgee County, Oklahoma; that the distribution and delivery of the bonds were not and at no time have been for the benefit of Jackson Barnett; that neither the Secretary of the Interior, nor any other officer of the Government, was at any time authorized by law to dispose of said bonds for the purposes above described, and that the acts of Albert B. Fall in disposing of the same were without warrant and authority of law. (R. 54-55.)

That Anna Laura Barnett, upon receiving $550,000 par value of said bonds as alleged, immediately delivered $150,000 par value thereof to one Harold C. McGugin, who thereupon delivered $15,000 par value thereof to the petitioner, Marshall L. Mott; that McGugin and Mott prior to the receipt by them of the bonds had actual knowledge of all the facts, circumstances, and matters recited in the complaint, and knew that the bonds were the property of Jackson Barnett and that Jackson Barnett was a mental incompetent, without mental capacity to make and initiate the said purported disposition of his bonds; that there was no consideration passing from Mott, or any person, to Barnett for delivery of the bonds. (R. 55-56.)

The complaint then alleges that Mott has refused to account to the United States for the bonds received by him, and prays that he be required to surrender the same to the Secretary of the Interior for the use of Jackson Barnett, subject to the restrictions thereon imposed by law, and if Mott has converted said bonds, that judgment be had for the value thereof. (R. 56-57.)

SUMMARY OF ARGUMENT

The purpose and policy of Congress in its legislation respecting the allotted property of the Five Civilized Tribes was to safeguard the individual ownership of the allottees, to prevent their exploitation, and to protect them from their own improvidence. The approval by the Secretary of the Interior of the attempted gift of a large part of

Jackson Barnett's restricted property to his purported wife and step-daughter, followed by the immediate delivery of a large part thereof to the wife's attorneys, strangers to Barnett, violated this long-established policy. Such disposal of his property was not for his "benefit" within the meaning of the Act of May 27, 1908, pp. 35–36, *infra*, the only source of such control as the Secretary of the Interior possessed over the restricted property. Accordingly, the approval by the Secretary of the purported thumb-marked request of Barnett for the gift of his property was without authority of law and invalid.

Moreover, at the time of the alleged gift Barnett was mentally deficient to the extent that he did not understand the nature and extent of his property or the nature or purpose of the alleged gift. Because of such mental incompetency (as distinguished from any incompetency arising out of his Indian status) Barnett could not make a valid gift of the bonds, and there was nothing upon which the approval of the Secretary of the Interior could operate. Accordingly, the title of Barnett to the bonds was not affected by the delivery thereof to his wife and to the Equitable Trust Company.

The petitioner received the bonds which are the subject of this suit with full knowledge of all the facts alleged in the second-amended complaint and of Barnett's mental incompetency. Therefore he acquired no right or title thereto.

ARGUMENT

I

THE DISTRIBUTION OF A LARGE PORTION OF JACKSON BARNETT'S BONDS TO HIS ALLEGED WIFE, FOLLOWED IMMEDIATELY BY THE DELIVERY OF PART THEREOF TO THE PETITIONER, WAS NOT FOR BARNETT'S BENEFIT WITHIN THE MEANING OF THE ACT OF MAY 27, 1908. SUCH DISTRIBUTION WAS THEREFORE INVALID AND DID NOT TRANSFER BARNETT'S RIGHT OR TITLE TO THE BONDS

Section 1 of the Act of May 27, 1908, p. 35, *infra*, provides:

> * * * all allotted lands of enrolled full-bloods, * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance * * * except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds *for the benefit of the respective Indians* as he may prescribe. (Italics ours.)

Although this Act only applies in terms to the "allotted lands" of full-bloods, it has been held, and it is conceded by the petitioner (Pet. Br. 14–15), that the income derived from restricted lands is impressed with the same trust in the hands of the Secretary of the Interior as the lands themselves. *United States* v. *Brown*, 8 F. (2d) 564, 567 (C. C. A. 8th), certiorari denied, 270 U. S. 644; *United States* v. *Hinkle*, 261 Fed. 518 (C. C. A. 8th). See also *Parker* v. *Richard*, 250 U. S. 235; *Sunderland* v. *United States*, 266 U. S. 226.

The original regulations issued under this Act (pp. 36–38, *infra*) provided that royalties accruing from any lease made on behalf of *incompetent* Indians should be held by the officer designated by the Secretary of the Interior or paid to the guardian or curator of the incompetent under order of the court having jurisdiction of the incompetent's estate. On October 7, 1922, these regulations were amended to provide that the Secretary might direct that such royalties be paid to the incompetents themselves "or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said 'cases'" (p. 38, *infra*).

The United States contends that under the statute the Secretary of the Interior is empowered to remove restrictions upon the allotted property of full-blood Creek Indians only when the disposal of the proceeds of such restricted property is *for the benefit of the particular Indian;* that the transaction by virtue of which the petitioner acquired that portion of Jackson Barnett's bonds which are the subject of this suit was not one for Barnett's benefit within the meaning of the statute, and that, therefore, the distribution of Barnett's bonds to his alleged wife (and thereafter to the petitioner), even though made with the approval of the Secretary of the Interior, was void.

By the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, Creek Indians to whom allotments were made became United States citizens. Whereas formerly

the legal title to the lands was in the tribe for the common use of the members, by virtue of the Act of March 3, 1893, the absolute fee-simple title to the allotted lands passed under the allotment deeds to the individual Indians, subject only to the statutory restrictions against alienation. See *Choate* v. *Trapp*, 224 U. S. 665; *United States* v. *Paine Lumber Co.*, 206 U. S. 467, 473; *Schrimpscher* v. *Stockton*, 183 U. S. 290. The rights of property thus acquired are within the constitutional guarantees of protection to the same extent as those of other citizens. *Choate* v. *Trapp*, *supra*.

The genesis of Section 1 of the Act of May 27, 1908, is found in Section 7 of the original Creek Agreement, approved March 1, 1901, c. 676, 31 Stat. 861, 863, which provided that the allotted lands "shall not be alienable by the allottee * * * except with the approval of the Secretary of the Interior." Almost the same language was used with respect to the restriction upon alienation in the Supplemental Creek Agreement, approved June 30, 1902, c. 1323, 32 Stat. 500, 503. Section 19 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, provided that the allotted lands should be inalienable for a period of 25 years "unless such restriction shall prior to the expiration of said period, be removed by Act of Congress."

From the foregoing it is clear that the Act of May 27, 1908, *supra*, which restored to the Secretary of the Interior the power to remove the restrictions on the alienation of allotted lands, is

but illustrative of other Acts which Congress has enacted in the exercise of its guardianship of its Indian wards. The general policy and purpose of such legislation has frequently been enunciated by this Court.

In *Heckman* v. *United States*, 224 U. S. 413, this Court, speaking with reference to the Act of March 3, 1893, *supra*, which provided for the allotment of lands to the individual members of the Five Civilized Tribes, said (pp. 432–433):

> But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligation, not simply by assuring an equitable apportionment of the property, but by safeguarding *the individual ownership of allottees* through suitable restrictions which were designed to secure them in their possession and to prevent their exploitation. (Italics ours.)

The Court also said (pp. 436–437):

> The placing of restriction upon the right of alienation was an essential part of the plan of individual allotment; and limitations were imposed by each of the allotment agreements. The separate statutes were supplemented by the general acts of 1906 and 1908, already mentioned. These restrictions evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning.

* * * * * *

> During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians can not be gainsaid. * * * Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed.

In *Sunderland* v. *United States*, 266 U. S. 226, a case involving the Act now under consideration, this Court, speaking with reference to the power of Congress to impose restrictions upon alienation, said (pp. 233–234):

> Such power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal Government to safeguard their interests and protect them against the greed of others and their own improvidence.

Unquestionably the purpose of Section 1 of the Act of 1908 was the protection of the individual Indian allottees in the use and enjoyment of their property, and the preservation of that property against their own improvidence, and the exploitation of others. In view of the declared purpose and policy of the statute, it seems clear that Congress did not contemplate outright gifts or gratuities by an Indian allottee of a substantial portion of his restricted property to members of his fam-

ily as a "disposal of the proceeds" of such property for his "benefit" within the meaning of the Act of 1908.

In the instant case a large portion, approximately $550,000, of Jackson Barnett's property was delivered outright to his alleged wife. It was intended, of course, as alleged in the complaint (R. 53), that approximately $350,000 of this amount should immediately become her absolute property, and this is demonstrated by the fact that she promptly transferred $150,000 to her attorneys, as compensation for their services in bringing about the delivery of the bonds to her by the Secretary of the Interior. On the face of it, this transaction was not one for the benefit of Barnett but one for the benefit of Barnett's alleged wife and her lawyers, including the petitioner. The alleged wife and her attorneys sought to give the purported gift an appearance of respectability by providing that $200,000 of the bonds received by her should be put in a trust, from which part of the income should be paid to Barnett during his life. This fact, however, can not prevent the transaction from being primarily and in the larger part for the benefit of persons other than Barnett. We submit that under the statute the disposal of the proceeds of restricted property must be for the benefit of the Indian in the sense that it contributes to his personal support, comfort, and enjoyment. It is not sufficient that the money be

distributed to some one who may possibly use it in some way beneficial to the Indian.

The contention of the United States is well expressed by the following statement in the opinion of the court below (R. 74):

> The statute is an assurance of protection against spoliation. The Secretary's duty and power are not complied with by simply removing restrictions on alienation to a large part, probably here the far greater part, of the ward's estate; as part thereof it is further required of him that he agree to the terms of sale and the disposal of the proceeds. He is given no authority to turn over the property or its proceeds to the Indian, nor consent that others might take to themselves the whole or a large part of it. Nor do we know of any authority in him to surrender the trust in which these bonds were held by the Government and consent to their deposit with others as trustees on terms that took from Barnett all property right in the principal and denied to him their full interest yield. * * *

The petitioner contends that the action taken by Secretary Fall in approving the purported request of Barnett for the gift to his alleged wife was in conformity with a well-settled construction by the Department of the Interior of the Act of May 27, 1908, and in support of this contention quotes short excerpts from various legal opinions of the Solicitor of the Department of the Interior.

Without endeavoring to point out the inapplicability of most of these quotations to the instant case, it is enough to say that the petitioner presents no case other than the present one where the Secretary of the Interior has held that he has the power to remove restrictions from allotted property so as to permit an Indian to make an absolute gift of a large part of his restricted funds to a member of his family.

The petitioner contends that the determination of whether the gift to Barnett's alleged wife was for Barnett's benefit was a matter within the exclusive discretion of the Secretary and argues that the honest exercise of discretion by an executive officer authorized to act in the premises can not be reviewed by the courts upon any issue of fact committed to his discretion. The United States does not question the correctness of the principle upon which this contention is based, but denies its applicability.

Under the Act of 1908, it is conceded that the Secretary possesses power to remove restrictions from allotted property where such action is for the benefit of the Indian, but his discretionary power does not permit him to determine that something is a benefit which, as a matter of law, could not be a benefit within the meaning of the statute. If the question whether Barnett was benefited within the meaning of the statute by the distribution of

his bonds had been fairly debatable, then the Secretary could have removed the restrictions. But the delivery of Barnett's bonds to his wife as an outright gift, we submit, as matter of law was not for his benefit and the approval of the gift was therefore wholly beyond the authority conferred upon the Secretary by the statute.

It is well established that a decision by the Secretary of the Interior on a question of law is not conclusive upon the courts and is subject to judicial review and correction. *Work* v. *Louisiana*, 269 U. S. 250, 254; *Santa Fe Pacific R. R. Co.* v. *Fall*, 259 U. S. 197, 199; *Lane* v. *Hoglund*, 244 U. S. 174; *Garfield* v. *Goldsby*, 211 U. S. 249; *Decatur* v. *Paulding*, 14 Pet. 497; *Hemmer* v. *United States*, 204 Fed. 898, 905 (C. C. A. 8th.).

Lane v. *Hoglund, supra*, was a proceeding for a writ of mandamus to compel the Secretary of the Interior to issue a patent to public land to an entryman who contended he had met all the statutory requirements therefor. In denying the contention that the Secretary's decision whether the requirements of the statute had been complied with was conclusive, this Court, quoting from an earlier case, said (p. 182):

> Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead

> that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

A similar view of the Secretary's power was set forth by this Court in *Garfield* v. *Goldsby, supra*, 211 U. S. 249, 262:

> In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the Acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

We submit that the contention of the petitioner that the act of Secretary Fall in approving the distribution of Barnett's bonds is not subject to review by the courts is untenable.

II

THE PURPORTED GIFT OF BARNETT'S BONDS TO HIS ALLEGED WIFE WAS INVALID BECAUSE OF HIS LACK OF MENTAL CAPACITY TO MAKE A GIFT. THE APPROVAL OF THE TRANSACTION BY THE SECRETARY OF THE INTERIOR DID NOT MAKE THE GIFT VALID

Although the court below based its decision upon the ground that the distribution of $550,000 par value of Barnett's bonds to his alleged wife was not for Barnett's "benefit" within the meaning of the Act of May 27, 1908, and that therefore approval of the alleged gift by the Secretary of the Interior did not operate to remove the statutory restrictions on the bonds, the United States contends that the attempted gift was invalid for the further reason that Barnett was mentally incapable of making a gift of the property, and that the approval of the transaction by the Secretary did not make the gift valid.

It is elementary that a clear intent of the donor to divest himself forever of his property is indispensable to a valid gift *inter vivos*. *Snavely* v. *Henderson*, 204 Fed. 978 (C. C. A. 8th). It is equally elementary that for a valid gift *inter vivos* the donor must possess sufficient mental capacity to be able to understand the nature and effect of the transaction. *Gibson* v. *Collins*, 4 F. (2d) 874, 878 (Ct. App. D. C.), certiorari denied, 267 U. S. 605; *Sawyer* v. *White*, 122 Fed. 223 (C. C. A. 8th); *Polt* v. *Polt*, 205 Pa. 139, 141; *Conners* v. *Murphy*, 100 N. J. Eq. 280, 282. Under these and similar authorities, it is clear that if the alleged gift to Bar-

nett's alleged wife required the assent thereto of Barnett for its validity it failed altogether.

Jackson Barnett could not and did not give away his bonds, if, indeed, it may be said the bonds, as such, were his. The allegations of the complaint show that he was and is unable to read or write any language, unable to readily understand the English language, and that he was, and is, incapable mentally of appreciating the nature or value of his property, the terms of the transaction by which the bonds were distributed, or the objects and purposes for which the bonds were given away. (R. 51, 53–54.) These allegations do not merely show "mental weakness" on the part of Barnett, as suggested in the petitioner's brief; they establish clearly that at the time of the purported gift there was entirely lacking the mental capacity on the part of Barnett to act. Under these circumstances, even if there had been no restrictions against the alienation of his property, the transaction would be open to rescission by him, or by his representative.

The petitioner contends that the mental status of Barnett is unimportant, and that even if he did not know what he was doing when he made the gift, the subsequent approval by the Secretary of the Interior supplied the requisite intent of the donor otherwise required and validated the entire transaction. The necessary effect of this contention is that under the statute the Secretary of the Interior possesses power to make, in his discretion, outright gifts of restricted property wholly with-

out regard to the intention, wishes, or consent of the Indian owner.

The United States contends that under Section 1 of the Act of 1908 the Secretary of the Interior has not been given the power to *initiate* or *make* alienations to third persons of restricted property. His power is only one of *ratification* or *approval*.

Section 1 of the 1908 Act (p. 35, *infra*) provides that the allotted lands "shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance * * * except that the Secretary of the Interior may remove such restrictions * * *." The power thus given to the Secretary is not to alienate, or sell, or encumber, but *to remove the restrictions* upon an alienation, sale, or encumbrance. His power in this respect is not different, we submit, than it was under the original Creek Agreement (See p. 12, *supra*), which provided that the allotted lands should "not be alienable *by the allottee* * * * except with the *approval* of the Secretary of the Interior." (Italics ours.)

Section 2 of the Act of 1908 (pp. 35–36, *infra*.) provides that all allotted lands other than homesteads "may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years * * *: *Provided*, That leases of restricted lands for oil gas or other mining purposes, * * * and leases of restricted lands for periods of more than five years,

may be made, with the approval of the Secretary of the Interior, * * * and not otherwise." In Section 2 of the Act the power of the Secretary with respect to *leases* of allotted property is expressly designated as a power of *approval*. This section expressly refers to leases by a guardian or curator where the Indian is incompetent. If the consent of the allottee, or of a guardian or curator where the Indian is incompetent, is necessary for a short-term lease *a fortiorari* such consent would seem to be necessary for *an absolute gift* of his restricted property.

It has frequently been held under Section 2 of the Act of 1908 and similar statutes with respect to the making of leases of restricted property that the Secretary possesses only the power of approval or disapproval, that he has no authority to initiate or make a lease, and that his approval of a lease made without consent of the allottee does not validate the lease. *Holmes* v. *United States*, 33 F. (2d) 688 (C. C. A. 8th); *Jennings* v. *Wood*, 192 Fed. 507 (C. C. A. 8th); *Midland Oil Co.* v. *Turner*, 179 Fed. 74 (C. C. A. 8th); *Hampton* v. *Ewert*, 22 F. (2d) 81 (C. C. A. 8th), certiorari denied, 276 U. S. 623; *Crosbie* v. *Brewer*, 68 Okla. 16, 26–27. See also *United States* v. *Brown*, 15 F. (2d) 565 (N. D. Okla.).

Jennings v. *Wood*, *supra*, involved the Act of July 1, 1902, providing that leases of the allotted lands of Cherokee citizens "for a period longer than five years * * * may also be made with

the approval of the Secretary of the Interior and not otherwise." This language is very similar to that used in Section 2 of the Act of 1908. The case cited was a suit to cancel a lease made by a Cherokee minor without participation by the guardian of her estate or under an order of the probate court. The court held that the lease was invalid and that the approval of the Secretary did not make it valid. In its opinion the court said (p. 508):

> The jurisdiction of the Secretary of the Interior is only that expressed in the acts of Congress. He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases. If an Indian did not desire to lease there was nothing for the Secretary to act upon; if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and they must have been competent to make the contract submitted for approval. A disapproval was merely a veto.

The views above expressed seem to be supported by the decision of this Court in *Sunderland* v.

United States, 266 U. S. 226, where the following statement was made with respect to the power of the Secretary under Section 1 of the Act of 1908 (p. 235):

> Since the allotted lands could not be sold or encumbered *without his consent*, and since the proceeds of any sale thereof were subject to his control and could only be disposed of *with his approval* and under such rules as he might prescribe for the benefit of the respective Indians, the extension of such control to the property in which the proceeds were directly invested would seem to be within the statute fairly construed. Indeed, we think the authority of the Secretary to *withhold his consent* to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control. * * * (Italics ours.)

This Court thus refers to the "consent" of the Secretary to a sale or encumbrance of the allotted property and to his "approval" of the disposal of the proceeds. If, as the United States contends, the power of the Secretary under Section 1 is only to consent to or approve alienations of restricted property, then the purported gift to Barnett's alleged wife in the instant case was wholly void because of Barnett's lack of mental capacity to make a gift.

Moreover, even assuming that in a proper case the Secretary of the Interior could initiate a gift or alienation of restricted property for the benefit of the Indian without regard to the wishes of the Indian, or of the guardian of an incompetent Indian, such is not the situation in the instant case. The disposition of Barnett's bonds did not grow out of an original undertaking by the Secretary to make a disposal thereof for Barnett's benefit. The complaint alleges that the "delivery of said bonds by the Secretary of the Interior was made and based upon a purported request in writing, bearing the thumbprint signature of the said Jackson Barnett." (R. 54.) The sole action of the Secretary was the approval of an alleged gift made by Barnett. Since the gift was wholly invalid because of Barnett's incapacity to understand what he was doing, the Secretary's approval was a nullity.

Barnett v. *Equitable Trust Co.*, 21 F. (2d) 325 (S. D. N. Y.), which involved the same transaction as in the instant case, was a suit (in which the United States intervened) by the person appointed as Jackson Barnett's guardian by the County Court of Okmulgee County, Oklahoma, as *prochein ami* for Barnett, to recover the $550,000 par value of bonds delivered by the Secretary of the Interior to the Equitable Trust Company. (See pp. 5–6, *supra*.) In that case the court held that the alleged gift of the bonds was void because of Barnett's lack of understanding; that the attempted

gift was not and could not be validated by the approval of the Secretary; and that the defendants should account for and deliver the bonds and proceeds thereof to the Secretary of the Interior as the property of Barnett. Judge Knox in his opinion said with reference to Secretary Fall's approval of the alleged gift (p. 326):

> But such approval, however honest and disinterested it may have been, can not give validity to a gift or donation which the apparent donor did not make, and which, by reason of mental incompetency, he was incapable of making. * * *

The petitioner argues that if it were necessary for Barnett to be able to comprehend what he was doing when the alleged gift of his bonds was made, then there is no need of any statutes giving the Secretary of the Interior general supervision over alienations of allotted property. But the Congress and this Court have always recognized a duty to protect Indians, as such, against their own improvidence, whether mentally competent or incompetent.

It is contended by the petitioner that since the transaction in question took place in the District of Columbia, its validity is to be determined by the laws of that place. But a mental incompetent who has no capacity to understand what he is doing or to determine intelligently whether he wants to do it, even if he is not insane, can not make a valid deed or contract in that jurisdiction. See *Gibson*

v. *Collins*, 4 F. (2d) 874, 878 (Ct. App. D. C.); certiorari denied, 267 U. S. 605.

The petitioner contends that the Secretary of the Interior, in approving the delivery of the bonds, must be regarded as having passed upon the question of Barnett's mental competency, and that his determination in that respect can not be questioned in the courts. Substantially the same contention was made and effectively answered in *Jennings* v. *Wood*, 192 Fed. 507 (C. C. A. 8th), *supra*. In denying the contention that the approval by the Secretary of a lease executed by a minor was a conclusive determination that the lessor was of age, the court said (p. 508):

> *It was no more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally*, or that he belonged to the class or his land was of the character covered by the statute, if in fact those conditions were wanting. The instrument went to the Secretary of the Interior as a lease competently executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did his decision would not be conclusive. (Italics ours.)

See also *United States* v. *Brown*, 15 F. (2d) 565 (N. D. Okla.).

The petitioner further argues that the United States has always recognized as valid the oil and gas lease on Barnett's allotment from which the royalties were derived which were used in purchasing the bonds here involved; that if Barnett, with the approval of the Secretary of the Interior, could make a valid lease he could initiate a valid gift of his property. The lease in question was executed in 1912. It was thumb-marked by Barnett, and signed, with the approval of the County Court of Okmulgee County, Oklahoma, by Carl J. O'Hornett, who had been appointed by that court as guardian for Barnett, and who at the time was acting in that capacity, and who, with his successor, Bailey, continued to act in that capacity for fourteen years thereafter. (R. 51.) It is true that in 1926 the Supreme Court of Oklahoma held the guardian's appointment invalid (see p. 4, *supra*), but in all the intervening time Barnett's guardian had been recognized and treated as such by the courts of Oklahoma and of the United States, by the Department of the Interior, by Barnett's alleged wife and the petitioner, and by all other parties mentioned in the complaint. (R. 51.) The lease was obviously intended to be made in strict conformance with Section 2 of the Act of May 27, 1908, providing for the execution of such leases "by guardian * * * under order

of the proper probate court" where the Indian was "incompetent," and under the circumstances—the lease having been largely executed—it is doubtful if any court would hold that the lease was invalid.

Moreover, the making of the lease was an action obviously for the personal and pecuniary *benefit of Barnett*. By the lease his property was not lessened but augmented. Clearly the making of the lease resembles in no way the transaction now before the Court.

As pointed out above, the contention of the petitioner that the delivery of the bonds to Barnett's alleged wife was a valid gift because it was approved by the Secretary of the Interior, even though Barnett did not know what he was doing at the time, amounts to a contention that the Secretary possesses a discretionary power to make outright gifts of restricted property without regard to the intention or consent of the Indian owner. It is submitted that such an extraordinary power should not be held to reside in the Secretary of the Interior unless the statute clearly requires such a construction; and, further, that there are grave doubts whether the statute, if so construed, would be constitutional.

The courts have frequently described the restricted property of Indian allottees in the control of the Secretary of the Interior as a "trust fund." It is elementary that a trustee can not give away

the property of his *cestui* merely because the trustee is convinced that the donation is for the best interests of his beneficiary. The Secretary of the Interior has frequently been called the "guardian" of the restricted property and the Indians have been referred to as "wards." But a guardian is held to the strictest accountability for the estate of his ward and can not make donations and gratuities from the same. *Moore* v. *Smith*, 182 Fed. 540 (C. C. A. 9th), certiorari denied, 219 U. S. 587; *In re LeBourgeois*, 144 La. 501. Nor can the curator or the committee of the estate of an insane person *personally* dispose of the insane person's property by donations. It is true that in relatively rare cases a *court* may permit allowances from the estate of the insane person for other than strictly legal obligations in situations where allowances are necessary for the *support* of relatives or needy persons, or even make allowances to charities, when it specifically appears that the insane person himself would have provided for such support or allowances had he been sane. *Matter of Flagler*, 248 N. Y. 415. But no court ever held that the committee of the estate of an insane person could make an absolute gift of a large portion of the estate to a member of the insane person's family under circumstances at all comparable to the gift to Barnett's alleged wife in the instant case. And some courts deny altogether the power

of a court of equity to order a gratuity to be paid from the estate of an insane person to his relatives or to a needy person who has been the recipient of the insane person's bounty when he was of sound mind. *Binney* v. *R. I. Hospital Trust Company*, 43 R. I. 222, 243.

Moreover, as previously pointed out, full-blood Creek Indians to whom allotments have been made are United States citizens, and their property and rights as such are within the protection of the Constitution. Even Congress may not impair these rights. In *Choate* v. *Trapp*, 224 U. S. 665, a case involving the same statute now under consideration, this Court said with respect to the rights of the Indian in his restricted property (p. 677):

> His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States * * *. His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.

It is submitted that Congress by the Act of 1908 did not intend to, and under the Constitution could not, vest in the Secretary of the Interior the arbitrary power to make outright gifts of restricted Indian property without the concurrence of the Indian owner.

III

SINCE THE PETITIONER RECEIVED THE BONDS WITH NOTICE OF THE FACTS ALLEGED IN THE COMPLAINT AND THE MENTAL INCOMPETENCY OF BARNETT HE ACQUIRED NO TITLE OR RIGHT THERETO

The second amended bill of complaint alleges that the petitioner and McGugin had actual knowledge of all the matters recited therein, that the petitioner received the bonds which are the subject of this suit from McGugin with full knowledge that they were restricted property of Jackson Barnett, that they were procured from royalties accruing from Barnett's restricted land, and that Barnett was mentally incompetent and without the mental capacity to make or initiate the alleged gift of the bonds in question to his wife. (R. 55–56.)

It is not necessary to cite authorities to sustain the contention of the United States that the petitioner stands in no better position than that of Barnett's alleged wife, or of McGugin, from whom he received the bonds. In *Barnett* v. *Equitable Trust Company, supra,* Judge Knox said with respect to this point (p. 332):

> As the instrument under which Barnett's funds were removed from the custody of the Secretary of the Interior was and is invalid, the defendants, both of which were put on notice of the Indian's incompetency, and the gifts having been without consideration,

can take no property or beneficial interest therein, and must be found to hold the same, together with the interest thereon, for the benefit of the rightful owner of the property.

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

THOMAS D. THACHER,
Solicitor General.
SETH W. RICHARDSON,
Assistant Attorney General.
NAT M. LACY,
PAUL D. MILLER,
Attorneys.

NOVEMBER, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Act of May 27, 1908, c. 199, 35 Stat. 312, 313, so far as here pertinent provides:

> SEC. 1. * * * That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restriction on alienation or incumbrance, be as follows: * * * all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. * * *
>
> SEC. 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the al-

lottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided,* That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further,* That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, * * *

* * * * * *

SEC. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

By the Act of May 10, 1928, c. 517, 45 Stat. 495, the period of restrictions upon alienation provided by Section 1 of the Act of May 27, 1908, was extended for a period of twenty-five years from April 26, 1931.

Section 24 of the Regulations prescribed by the Secretary of the Interior under the Act of May 27, 1908, approved March 3, 1921, provided:

24. All royalties, rents, or payments due under leases which have been or may be approved by the Secretary of the Interior, shall be paid to the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, or to such other person as may be designated by the Secretary of the Interior, for the benefit of the various lessors, or, in cases of minors and incompetents, shall be deposited as hereinafter specified. No royalties on such leases shall be paid by the lessee direct to the lessors or their representatives.

* * * * *

All royalties, rents, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be held by the Superintendent for the Five Civilized Tribes, or such other officer as may be designated by the Secretary of the Interior, to the credit of the guardian (or curator) of such minor or incompetent and shall be paid to such guardian (or curator) upon voucher executed by him and approved by the Judge of the County (Probate) Court having jurisdiction of the estate of such minor or incompetent (the form of such voucher to be prescribed by the Department), or upon authority of such court in the form of an order satisfactory to said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes.

Provided, however, that the said Superintendent or other officer in charge of the office of the Superintendent for the Five Civilized Tribes, is authorized in his discretion, where considered for the best interests of any adult, minor, or incompetent lessor, or his or her heirs, for whose account royalties, rents, or payments accruing under any

lease have been paid to said Superintendent, to withhold the disbursement of such royalties, rents, or payments, wholly or in part from any such adult, or guardian or curator of any such minor or incompetent, or his or her heirs, until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.

On October 7, 1922, Section 24 of the Regulations of March 3, 1921, was amended by the addition thereto of the following paragraph:

> And provided further, that in such individual cases or classes of cases as the Secretary of the Interior may direct, the Superintendent for the Five Civilized Tribes shall cause such payments as may be authorized to be made out of the royalties and other individual Indian funds of the restricted Indians, minors and incompetents, to be paid direct to the Indians entitled thereto or to be otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases.

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DEC 1 1930
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

OCTOBER TERM—1930.

No. 78.

MARSHALL L. MOTT, *Petitioner,*

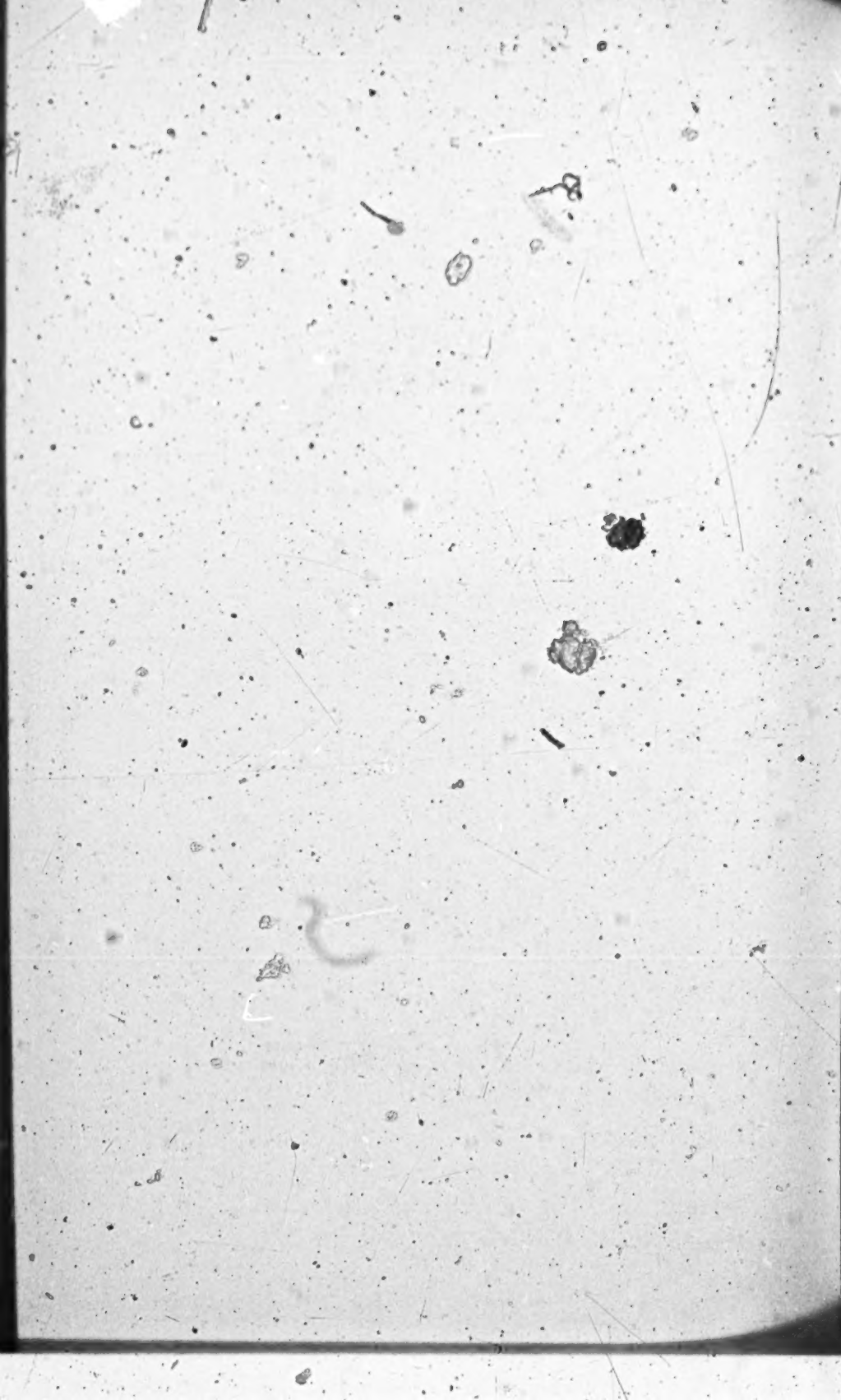
against

UNITED STATES OF AMERICA, *Respondent.*

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF AMICI CURIAE

JOHN W. DAVIS,
HUGH H. O'BEAR,
CARROLL G. WALTER,
RAYBURN L. FOSTER,
ALMOND D. COCHRAN,
Amici Curiae.



INDEX

	PAGE
History of the Litigation	2
The Applicable Statutes	4
The Jurisdiction of the Oklahoma Courts over Incompetent Members of the Five Civilized Tribes	8
The Power of the Secretary of the Interior to dispose of Funds Belonging to an Incompetent Indian	15
Application of the Foregoing Principles to the Case at Bar	22

Table of Cases Cited

Barnett *v.* Equitable Trust Co., 21 Fed. 2d, 325; appeal dismissed 26 Fed. 2d, 350; certiorari denied 278 U. S. 626	3, 4, 21
Chisholm *v.* Creek & Indiana Dev. Co., 273 Fed. 589, affirmed 282 Fed. 93; reversed in part 264 U. S. 288	13
English *v.* Richardson, 224 U. S. 680	4
Ewert *v.* Bluejacket, 259 U. S. 129	11, 18
Harris *v.* Bell, 254 U. S. 103; aff'g 250 Fed. 209	6, 15
Jefferson *v.* Fink, 247 U. S. 288	4
Jennings *v.* Wood, 192 Fed. 507	6, 16
Kendall *v.* Ewert, 259 U. S. 139	18
La Motte *v.* United States, 254 U. S. 570	8
Lytle *v.* Fulotka, 106 Okla. 86; 233 Pac. 456	6, 12
Morrison *v.* Burnette, 154 Fed. 617	6
Parker *v.* Richard, 250 U. S. 235	13, 14
Priddy *v.* Thompson, 204 Fed. 955	13
Robinson *v.* Long Gas Co., 221 Fed. 398	6
United States *v.* Debell, 227 Fed. 760	8

PAGE

United States *v.* Gypsy Oil Co., 10 Fed. 2d, 487 13
United States *v.* McGugin, 28 Fed. 2d, 76 3
United States *v.* Mott, 33 Fed. 2d, 340; reversed 37 Fed. 2d, 860 ..... 3, 4, 9, 21
Webster *v.* Fall, 266 U. S. 507 14
Yarhola *v.* Strough, 64 Okla. 195; 166 Pac. 729 ..... 6, 10, 12

TABLE OF STATUTES CITED

Acts of Congress:

Act of March 1, 1889, 25 Stat. 783 5
Act of May 2, 1890, 26 Stat. 81 5
Act of March 1, 1895, 28 Stat. 693 5
Act of June 7, 1897, 30 Stat. 62 5
Act of March 1, 1901, 31 Stat. 861 4
Act of June 30, 1902, 32 Stat. 500 4
Act of April 21, 1904, 33 Stat. 189 ..... 4, 5
Act of April 28, 1904, 33 Stat. 574 ..... 5, 8, 10
Act of April 26, 1906, 34 Stat. 137 ..... 5, 6
Act of June 16, 1906, 34 Stat. 267 5
Act of May 27, 1908, 35 Stat. 312 ..... 6, 7, 8, 9, 10, 14

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MARSHALL L. MOTT,

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CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF *AMICI CURIAE*.

Some of the signers of this brief are counsel for the plaintiff in the case of *Jackson Barnett, a mental incompetent, by Elmer S. Bailey, next friend,* v. *Riggs National Bank and others,* Equity No. 53,547, in the Supreme Court of the District of Columbia, which arises out of the same transaction which is involved in this case. Some of the signers are counsel and respondents in *United States* v. *Equitable Trust Company, et al.,* No. 21 of this term, which apparently has been thought to have such a relation to this case as to make it proper for this case to be advanced for argument immediately thereafter.

We therefore desire the opportunity of placing before

the court our views as to the nature and extent of the power of the Secretary of the Interior over Indian funds, in so far as that question is germane to the issues in these cases.

As preliminary thereto, it seems appropriate to give a succinct statement of what may fairly be termed the "Jackson Barnett litigation."

History of the Litigation.

Jackson Barnett is a full-blood Creek Indian. Upon the allotment of the tribal lands he received 160 acres in what is now Creek County, Oklahoma. An oil and gas lease of his allotment was made in 1912 by a guardian appointed by the County Court of Okmulgee County, Oklahoma, and approved by the Secretary of the Interior (Record in *United States* v. *Equitable Trust Co.*, pp. 14-20). The lease provided that the royalties should be paid to the United States Indian Superintendent, Union Agency, Muskogee, Oklahoma (id. 14), which office subsequently was abolished and the office of Superintendent for the Five Civilized Tribes created in lieu thereof. By 1920 the royalties had accumulated to the extent of approximately $1,000,000, and had been invested in United States Liberty Bonds which were held by the Secretary of the Interior.

In February, 1920, a marriage ceremony was performed between Barnett and a white woman named Anna Laura Lowe.

In February, 1923, $1,100,000 of Liberty Bonds, representing investment of the royalties, were distributed by the Secretary upon the basis of a thumb-marked letter of Jackson Barnett addressed to the Secretary and approved by him. The wife received $550,000 of the bonds, and the

other $550,000 were turned over to The Equitable Trust Company of New York under a trust under which they ultimately were to go to American Baptist Home Mission Society. Of the bonds given to the wife, $150,000 were transferred by her to Harold C. McGugin, her attorney, and McGugin in turn transferred $15,000 thereof to Marshall L. Mott, the petitioner in this case. The wife also placed $200,000 of the bonds transferred to her in a trust with Riggs National Bank in Washington, D. C.

After this distribution was made, the original guardian, Carl J. O'Hornett, resigned, and the County Court of Okmulgee County appointed Elmer S. Bailey as his successor.

Bailey caused a suit to be brought, in the name of Barnett by himself as *prochein ami*, for the recovery of the $550,000 of bonds transferred to Equitable Trust Company, and that suit has been successfully tried in the District Court of the United States for the Southern District of New York. It will be found in the reports in 21 Fed. 2d, 325, appeal dismissed, 26 Fed. 2d, 350, certiorari denied, 278 U. S. 626.

Bailey also caused a like suit to be brought for the recovery of the $200,000 of bonds placed in trust with Riggs National Bank. That case has not yet been tried and is now pending, as above stated, in the Supreme Court of the District of Columbia as Equity No. 53,547. The United States intervened in that case and then brought a separate suit which was consolidated with it.

The United States brought a suit against McGugin and its bill was dismissed upon motion in 28 Fed. 2d, 76.

The United States also brought a suit against Mr. Mott. It was unsuccessful in the District Court, 33 Fed. 2d, 340,

but prevailed in the Circuit Court of Appeals, 37 Fed. 2d, 860. That is the suit which is now here on certiorari.

The two opinions sustaining the right of recovery are thus to be found in 21 Fed. 2d, 325, and 37 Fed. 2d, 860. A comparison of the two opinions will show that the two courts, while reaching the same result, adopted somewhat different lines of reasoning. Thus the decision of the District Court for the Southern District of New York went upon the ground that the attempted gift by Barnett was voidable, notwithstanding the approval of the Secretary of the Interior, because of the mental incapacity of Barnett to express a valid assent, while the Circuit Court of Appeals for the Tenth Circuit, in the case at bar, held that entirely aside from the question of Barnett's mental capacity and granting the power of the Secretary of the Interior to remove restrictions, that official had no power to assent to a disposal of the funds to others or upon terms which took from the Indian all property right in the principal and denied him its full interest yield.

The Applicable Statutes.

The allotment of the Creek lands vested in the allottees a full and complete fee simple title to the land (*Jefferson* v. *Fink*, 247 U. S. 288, 289, 294) and gave them such a right of property therein that Congress itself could not now take their land away from them (*English* v. *Richardson*, 224 U. S. 680). Their right of alienation, however, was restricted for a period of five years (Act of March 1, 1901, 31 Stat. 861, c. 676, § 7; Act of June 30, 1902, 32 Stat. 500, c. 1323, § 16, known as the *Original Creek Agreement* and *Supplemental Creek Agreement*, respectively).

By an Act of April 21, 1904 (33 Stat. 189, c. 1402), all restrictions upon alienation of lands of allottees who are

not of Indian blood were removed, except minors and except as to homesteads, and the Secretary of the Interior was given authority to remove restrictions upon adult allottees of Indian blood.

Congress then passed the Act of April 26, 1906 (34 Stat. 137, c. 1876), by § 19 of which it was provided that no full-blood Indian should have power to alienate or encumber any of the lands allotted to him for a period of *twenty-five years* "unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress." Thus, so far as full-bloods were concerned, the restriction upon alienation was extended to *April 26, 1931*, and the power to remove restrictions, which had been conferred upon the Secretary by the Act of April 21, 1904, was taken away from the Secretary and retained in the control of Congress itself.

In the meantime, however, Congress had enacted another statute which completed its gradual process of subjecting the Indians to the jurisdiction of the Territorial courts and to the laws which Congress put in force in the Indian Territory*. That statute is the Act of April 28, 1904 (33 Stat. 574, c. 1824), which provided as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and *ex-*

*As early as 1877 the Indian Territory was for judicial purposes attached to the Western District of Arkansas. In 1883 a part of the Territory was annexed to the Western District of Kansas and another part of the Northern District of Texas. In 1889 Congress established a United States Court in the Indian Territory (Act of March 1, 1889, 25 Stat. 783). *At first, however, that court was given no jurisdiction over Indians. They were left subject to the tribal laws and the tribal courts.* By subsequent acts the jurisdiction of the United States court was enlarged, the tribal courts and tribal laws were abolished, certain of the general laws of Arkansas were put in force in the Indian Territory, and the Territorial court was authorized to exercise the powers of courts of probate (Act of May 2, 1890, 26 Stat. 81; Act of March 1, 1895, 28 Stat. 693; Act of June 7, 1897, 30 Stat. 62). There then followed the Act of April 28, 1904, quoted in the text, by which, as above stated, the process of subjecting the Indians and their property to local laws and local courts was completed.

tended in their operation, so as to embrace all persons and estates in said Territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said Territory in the settlements of all estates of decedents, *the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise.*"

In connection with the policy of Congress in thus subjecting the Indians to the jurisdiction of the local courts established by Congress, it is significant to note that in Section 20 of the Act of April 26, 1906, above referred to, Congress had provided that "allotments of minors and incompetents may be rented or leased under order of the proper court," and consequently leases by minors or incompetents, made after the effective date of the Act of April 26, 1906, were void unless approved by the court, even though approved by the Secretary (*Morrison* v. *Burnette,* 154 Fed. 617, 620-622; *Jennings* v. *Wood,* 192 Fed. 507; *Robinson* v. *Long Gas Co.,* 221 Fed. 398, 401).

When Oklahoma became a State, in 1907, its courts of original jurisdiction became the successors of the Territorial courts, and the persons and estates of Indians were made subject to the laws of Oklahoma except as otherwise expressly provided by Congress (§ 19 of Act of June 16, 1906, 34 Stat. 267, c. 3335, called the Enabling Act); and since the admission of Oklahoma to statehood the County Courts of that State have exercised and now possess the jurisdiction formerly exercised by the United States Courts of the Indian Territory (*Yarhola* v. *Strough,* 166 Pac. 729; *Lytle* v. *Fulotka,* 233 Pac. 456; *Harris* v. *Bell,* 254 U. S. 103, 111, affirming 250 Fed. 209, 215).

It was in this situation that Congress passed the Act of May 27, 1908 (35 Stat. 312, c. 199).

Section 1 of that Act deals with restrictions on alienation. Its provisions as to Indians of less than full blood may be laid aside as not here material. As to allotted lands of full bloods, it provides that they shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance, prior to April 26, 1931,

> "*except* that the Secretary of the Interior may remove such restrictions, *wholly or in part,* under such rules and regulations concerning *terms of sale and disposal of the proceeds* for the *benefit* of the respective Indians as he may prescribe."

Section 2 of that Act deals with leases of restricted lands, and we quote it in full with italics to emphasize features which we think it important to note:

> "That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, *or by guardian or curator under order of the proper probate court if a minor or incompetent,* for a period not to exceed five years, without the privilege of renewal; *Provided,* That leases of restricted lands *for oil, gas or other mining purposes,* leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, *may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents* shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of eighteen years."

The entire jurisdiction and power of the Secretary under the Act of May 27, 1908, is thus limited to two things: He may remove restrictions, and he may approve or disapprove (*a*) oil and gas leases, (*b*) leases of more than five years, (*c*) leases of homesteads of over one year. Subject to that power, the jurisdiction of the probate courts of Oklahoma over minor and incompetent Indians is full and complete. It was made so by the Act of April 28, 1904, quoted above, and is so recognized in the Act of May 27, 1908, itself.

The jurisdiction of the Oklahoma Courts over incompetent members of the Five Civilized Tribes.

It will be convenient at this point, we think, to clear up some confusion which seems to exist as to the term "incompetent" as applied to full-blood Indians of the Five Civilized Tribes. There is nothing in the legislation with respect to those Tribes which authorizes the Secretary to make determinations as to the "competency" of the respective members thereof, such as are provided for in the legislation with respect to other tribes (See *La Motte* v. *United States*, 254 U. S. 570, as to the Osages, and *United States* v. *Debell*, 227 Fed. 760, as to the Sioux.) It is true, of course, that the reason why Congress restricted the alienation of lands allotted to the Five Civilized Tribes is that those Indians, as a class, were regarded as unable to cope with their white neighbors in business transactions and as needing safeguards against both the greed of others and their own improvidence. It is true, also, that the provisions in the Acts of 1904, 1906, and 1908, removing certain restrictions on alienation, show that, in a broad and

general sense, Congress has regarded *quantum* of Indian blood as some indication of the capacity of members of those tribes to look out for themselves. *But Congress has not classed all full-blood Indians as mental incompetents. The mere existence of restrictions on alienation is not in itself an indication of mental incapacity.* On the contrary, full-blood Indians of the Five Civilized Tribes constantly are making contracts and being held bound by them, and by the express terms of Section 2 of the Act of May 27, 1908, adult full-bloods may make leases of their allotments for a period not to exceed five years (other than oil and gas leases) without the approval or guidance of the Secretary or any court. Congress thus expressly recognized that some full-bloods have contractual capacity, and the statement of the Circuit Court of Appeals in this case that the provisions of the Act of May 27, 1908, in and of themselves "established Barnett's legal incompetency to manage his own affairs" (37 Fed. 2d, 862) is erroneous.

Congress has further recognized, however, that among these Indians, as among white people, there are particular individuals of such defective mentality as to require an individual guardianship in addition to the general so-called guardianship which the United States, as a government, maintains toward all Indians in general. The same need for such particular and individual guardianship has been recognized and provided for in the case of minors; *and with respect to both minors and incompetents Congress has confided that individual guardianship to the local courts by conferring upon them jurisdiction to appoint individual guardians for all minors and for those adult Indians whom those courts find to be of such defective mentality as to need individual guardianship.* That jurisdic-

tion existed under the Acts of April 28, 1904, and of April 26, 1906, and was continued by the Act of May 27, 1908.

This was specifically decided in *Yarhola* v. *Strough*, 64 Okla. 195, 166 Pac. 729 (1917), to which the United States was a party. One of the County Courts of Oklahoma had found a full-blood Creek to be incompetent and had appointed a guardian. The Indian *and the United States* moved to discharge the guardian on the ground that the court was without jurisdiction, and in affirming a denial of that motion the Supreme Court of Oklahoma said (166 Pac. 730):

> "In support of their first contention counsel cite many cases to the effect that, the relation of a full-blood Creek Indian to the United States resembles that of a ward to the guardian, and argue from this, if we understand counsel's position correctly, that inasmuch as the United States occupies the relation of guardian toward Lessey Yarhola, the county court had no jurisdiction to appoint another guardian for her. We are unable to agree with the conclusion reached by counsel. Whilst it is quite true that these full-blood Indians are yet wards of the Nation in the sense stated by the cases cited, *yet the guardianship which the government has maintained over them must necessarily be performed through such instrumentalities or persons as provided for by the Congress.* In this jurisdiction these duties in the main, if not quite wholly, are intrusted to the Secretary of the Interior *and the county courts of the state.*
>
> "No useful purpose can be subserved by reviewing at length the various acts of Congress which authorize the county courts of the state to appoint guardians for incompetent Indians. *It is sufficient to say on this point that there are many of them, and their purpose*

and import is so clear that a casual reading of them settles definitely the question in favor of jurisdiction.

"There are many essential duties which may be performed by the guardian for a ward in the condition of Lessey Yarhola that do not in the slightest degree conflict with any duty toward her which by law are to be performed by the Department of the Interior. *The Department of the Interior has never been directly charged with the duty of caring for the estate of minors or incompetents or their education or maintenance. Such duties as these have always been performed by guardians appointed by the state or territorial courts.* It seems quite clear to us that Congress has expressly authorized the county courts of the state to appoint guardians for full-blood Creek incompetents, and we are unable to see any inconsistency between the exercise of this power by the state courts and the general guardianship of the government. The scope of the duties and authority of a guardian appointed for incompetent Indians by the county court not being involved herein, we do not attempt to determine the same, or define the zone within which he may act without coming in conflict with the authority of the Secretary of the Interior.

"Upon the question of the competency of Lessey Yarhola it is sufficient to say that we have examined the record very carefully, and believe the findings of the county and district court on that question are sufficiently supported by the evidence. As we have said before, an honest and efficient guardian can be of great benefit and assistance to Lessey Yarhola, not only in the matter of her personal care and education, but in the preservation and care of her large estate."

As that case was decided in 1917 and involved the construction of Acts of Congress, and especially as the United States was a party to it, there properly may be said of it what this court said in *Ewert* v. *Bluejacket*, 259 U. S. 129,

137, of a prior decision by a Circuit Court of Appeals construing another Act of Congress, viz.:

> "This decision was rendered over ten years ago and if it had been deemed an erroneous construction of the act, Congress would no doubt have long since modified it."

The doctrine of *Yarhola* v. *Strough* was reaffirmed in 1925 in the case of *Lytle* v. *Fulotka*, 106 Okla. 86, 233 Pac. 456, 457, in which the Supreme Court of Oklahoma again said:

> "The probate courts of the state of Oklahoma have jurisdiction to sell the inherited lands of incompetent, adult, full-blood Indians of the Five Civilized Tribes. It is contended that section 6 of the Act of May 27, 1908 (35 Stat. 313), grants jurisdiction to the probate courts of the state of Oklahoma only in the case of *minor* allottees. Said section is limited by its terms to minors and minor allottees, but the probate courts of this state and former Indian Territory have habitually exercised probate jurisdiction, not only over the estates of minor allottees, but of minor heirs as well. *Yarhola* v. *Strough*, 64 Okla. 195, 166 P. 729. Section 6 of such act is *not the source of jurisdiction* of the probate courts of the State of Oklahoma over the *estates of Indian minors*. It is merely declaratory of the law as it had existed since the passage of the Act of April 28, 1904 (chapter 1824, 33 Stat. 573), if not before. By that act, it was provided:
>
> 'And full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of *minors and incompetents*, whether Indian, freedman or otherwise.'
>
> "Thus, full probate jurisdiction was granted to the district courts of Indian territory over the estates of

decedents, minors, *and incompetents*, 'whether Indian, freedman or otherwise.' Morrison *v.* Burnette, 154 F. 617, 83 C. C. A. 391; Jennings *v.* Wood, 192 F. 507, 112 C. C. A. 657; Robinson *v.* Long Gas Co., 221 F. 398, 136 C. C. A. 642; Cowles *v.* Lee, 35 Okla. 159, 128 P. 688; Wellsville Oil Co. *v.* Miller, 44 Okla. 493, 145 P. 344.

"Upon the admission of the state into the Union, this jurisdiction was, by virtue of the Constitution and enabling act, conferred upon the probate courts of the state. *Congress recognized the jurisdiction of the probate courts over the estates of incompetents by Section 2 of the Act of May 27, 1908, when, in providing for the leasing of restricted lands for oil and gas, it added this proviso*:

> 'And provided further that the jurisdiction of the probate courts of the state of Oklahoma, over lands of *minors and incompetents* shall be subject to the foregoing provisions.'"

In exercising their jurisdiction over minor and incompetent Indians the courts of Oklahoma are of course acting under authority of Congress and *as Federal agencies;* and hence the assertion of their jurisdiction involves no assertion of any conflict between State power and Federal power, nor the assertion of any right in a State to direct or control Indian affairs or Indian property.

Parker v. *Richard*, 250 U. S. 235, 238, 239.
United States v. *Gypsy Oil Co.*, 10 Fed. 2d, 487, 491, 492.
Priddy v. *Thompson*, 204 Fed. 955, 958.
Chisholm v. *Creek & Indiana Development Co.*, 273 Fed. 589, affirmed 282 Fed. 93, reversed in part 264 U. S. 488.

It is a matter of grave doubt, we submit, whether the Secretary has authority to take or hold royalties under an oil and gas lease of Creek allotments.* In the Act of May 27, 1908, Congress dealt with removal of restrictions on alienation in one section and dealt with the approval of leases in another section. The fair inference, therefore, is that Congress recognized that the two things are distinct and intended to draw a distinction between them, and that the failure to repeat in Section 2 the language found in Section 1—"under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe"—was the manifestation of a deliberate intent that the power as to leases conferred by Section 2 should be narrower than the power as to removal of restrictions conferred by Section 1, *i. e.*, that the "rules and regulations" contemplated by Section 2 are rules and regulations relating to the *approval* of the lease, and that the power to make rules and regulations "concerning terms of sale and disposal of the proceeds" *of the lease* was impliedly withheld.

But even if the Secretary's requirement that royalties be paid to and retained by him until he sees fit to surrender them to the Indian be valid as to *adult* and *competent* Indians, such requirement, we submit, is clearly invalid as to *minor* and *incompetent* Indians, because, as to such Indians, such requirement constitutes an unlawful assumption by the Secretary of powers and duties conferred by Congress upon the probate courts, acting through guardians duly appointed by them. That conclusion seems to follow

*The question whether the Secretary has such authority undoubtedly "lurked in the record" in *Parker* v. *Richard*, 250 U. S. 235, but as it was not actually raised we believe the question still remains undecided (*Webster* v. *Fall*, 266 U. S. 507, 511), and it is for that reason we suggest the question although it is not necessary to decide it in this case.

from the general rule that "a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property", which rule obtains in Oklahoma and has been adverted to by this court in construing the Act of May 27, 1908 (*Harris* v. *Bell*, 254 U. S. 103, 112).

The power of the Secretary of the Interior to dispose of funds belonging to an incompetent Indian.

Assuming, however, that the Secretary's power, even with respect to a minor or incompetent Indian, is such as to authorize him to *receive* and *hold* the royalties until he sees fit to release them, the question remains as to the nature and extent of his power over their *disposal* when he makes his determination to release them. And that is the crux of the issue in this case.

With respect to the funds of an *adult* and *competent* Indian, the Secretary, when he decides to release them, obviously may pay them to the Indian or to such person as the Indian may direct—to him or upon his order; and we think there can be no possible doubt that, in the absence of fraud practiced *by* or *upon* the Secretary, such a payment of the funds would be of unquestionable validity. If an adult and competent Indian desires to make a gift to his wife or to charity, he has the right to do so if the Secretary approve, *i. e.*, if the Secretary be willing to remove the restriction upon alienation; and if the Indian have a full appreciation of what he is doing, we think there is nothing to prevent the Secretary from removing the restriction on alienation by giving his approval to such a gift.

But with respect to the funds of a *minor* or *incompe-*

tent Indian, the lack of any contractual capacity in the owner of the fund prevents the Secretary from ever having before him a valid order or consent or direction for payment; and although the Secretary's power and authority to remove the restriction on alienation be just as complete and absolute as it is with respect to the funds of an adult and competent Indian, his act in removing the restriction cannot make the payment valid because the payment still lacks the essential element of a valid direction or consent by the owner of the fund. In other words, a minor or incompetent Indian is incapable of having a legally valid desire or intent to make a gift to his wife or to a charity or to anyone else, and although the minority or incompetency of the Indian does not in any way lessen the Secretary's authority to remove the restriction on alienation, it prevents his removal of that restriction from effectuating a valid gift.

Stated in another form, the Secretary has complete power to remove restrictions on alienation by approving deeds and other conveyances, regardless of whether those conveyances be for a valuable consideration or entirely voluntary; but he cannot supply any defect in a deed or conveyance other than the requisite that he approve it. If a request for payment or a proposed contract, when submitted to him, be invalid (void or voidable) upon any ground other than the fact that it lacks his approval, it still has the same status in that respect after his approval that it had before. His approval of it does not in any way change its status except in the respect that by his approval the restriction on alienation is removed.

An authority directly in point is *Jennings* v. *Wood*, 192 Fed. 507 (C. C. A. 8th Circuit). In that case, a *minor* allottee of the Cherokee tribe (which, like the Creek, is one of the

Five Civilized Tribes) made an oil and gas lease which was approved by the Secretary; and the lease was cancelled on the ground that a minor is *incapable of contracting,* even though the Secretary had undertaken to find as a fact that the minor was of age at the time the lease was made. The statute under which the Secretary acted in that case provided that such leases might be made "with the approval of the Secretary of the Interior and not otherwise", and hence is practically identical with the Act of May 27, 1908. The contention was pressed in that case that the Secretary's approval of the lease was the act of a tribunal exercising judicial power and necessarily involved the contractual capacity of the lessor, and that his finding that she was of age was conclusive. That contention was rejected and the court said (p. 208):

> "The jurisdiction of the Secretary of the Interior is only that expressed in the acts of Congress. *He was not constituted the general guardian of the estates of the Indians in the sense in which that term is usually employed. Power was not conferred upon him to originate and make leases of allotted lands. That was left to the Indians subject to his approval in specified cases.* If an Indian did not desire to lease there was *nothing for the Secretary to act upon;* if he did, and the lease was for oil and gas, its validity depended on the approval of that official, but he was not one of the contracting parties. On the contrary, his connection with the transaction and his authority first arose after the minds of the contractors came together, and *they must have been competent to make the contract submitted for approval.* A disapproval was merely a veto. An approval which proceeds upon a consideration of the terms of the instrument offered and whether they are reasonably for the interests of the Indian was intended as an additional safeguard

for his protection. It would not, however, reach back and supply or confirm all the essential legal prerequisites of a valid contract. *It was no more a conclusive determination that the lessor, though a minor, was an adult, than that he was sound mentally* or that he belonged to the class or his land was of the character covered by the statute, if in fact those conditions were wanting. The instrument went to the Secretary of the Interior as a lease competently executed and he could act on that presumption. He might properly make preliminary inquiry for his further assurance and he doubtless would decline to approve if advised of fatal defects, but he was not required to investigate and decide judicially matters lying back of and not appearing upon the face of the instrument. If he did, his decision would not be conclusive."

That case was decided in 1911, and thus there can be said of it precisely what was said in *Ewert* v. *Bluejacket*, 259 U. S. 129, 137, with reference to another decision by the same court in construing another Act of Congress:

> "This decision was rendered over ten years ago and if it had been deemed an erroneous construction of the Act, Congress would no doubt have long since modified it."

In *Kendall* v. *Ewert*, 259 U. S. 139, the District Court had dismissed a suit which had been brought to declare void a deed from an Indian to a special assistant to the Attorney General. After that decision, the grantee paid the Indian $700 for *a quitclaim deed* and a stipulation to dismiss the action with prejudice. He then moved to dismiss the Indian's appeal from the District Court's decision, and the Indian moved to cancel the stipulation as having been procured by fraud and without notice to his

counsel. The Circuit Court of Appeals, after an investigation, dismissed the Indian's appeal. A further appeal was then taken to this court, and this court reviewed the evidence as to the mental incapacity of the Indian and said (p. 148):

> "Upon a full review of the evidence as it is now before us, we do not hesitate to conclude that Redeagle was *not competent* to contract as, in form, he did in the stipulation to dismiss and that it must, therefore, be decreed to be void, notwithstanding the fact that at the time Ewert was not in the employ of the Government."

The court then further said (pp. 148, 149):

> "But, it is argued, the quit-claim deed for the land executed at the same time as this stipulation, on July 5, 1918, was *approved by the Assistant Secretary of the Interior* on January 27, 1922, as appears by the copy filed with the clerk of this court, and that the doctrine of relation makes this deed effective from its date.
>
> "*Of this it would be enough to say that Redeagle was no more competent to make this deed than he was to make the stipulation which we have just held to be void,* but we may add that the doctrine of relation is a legal fiction, resorted to for the purpose of accomplishing justice, 'to prevent a just and equitable title from being interrupted by claims which have no foundation in equity.' *Lykins* v. *McGrath,* 184 U. S. 169, 171; *Pickering* v. *Lomax,* 145 U. S. 310; *Lomax* v. *Pickering,* 173 U. S. 26; *Peyton* v. *Desmond,* 129 Fed. 1, 11. Obviously such a doctrine cannot be resorted to to give validity to a deed obtained under conditions such as we are considering,—it cannot take root in such a soil. We cannot know what disclosure of the conditions under which it was executed was made to

the Department when the deed was approved, but we do not doubt that if a full disclosure had been made approval would not have been given, *and the deed must be decreed to be void.*".

That, therefore, is a case in which this court held that a conveyance by a mentally incompetent Indian was void *because of his incompetency* even though it had been approved by the Secretary. The court did *not* place its decision upon the ground of any lack of power in the Secretary to remove restrictions because the consideration for the deed was inadequate and hence the deed was not for the "benefit" of the Indian.

Considering all the legislation together, the correct view thus seems to us to be this: The Secretary has absolute and unlimited authority to remove restrictions "wholly or in part" with respect to the funds of both adult and competent Indians and of minor and incompetent Indians. When he decides to remove the restriction from the property of an adult and competent Indian, that property may and must be disbursed or conveyed either to the Indian or to such person as the Indian may direct, for the Indian is the owner of the fund and has the absolute right to dispose thereof whenever the Secretary decides to remove the restriction. But when the Secretary decides to remove the restriction from the property of a *minor* or *incompetent* Indian, that property *must* be disbursed or conveyed to a *guardian* of such minor or incompetent Indian, for although the minor or incompetent is the owner of the fund he lacks the contractual capacity necessary to enable him either to receive or to disburse or convey the property; and if the Secretary assume to disburse or convey the property to anyone other than such a guardian, the conveyance necessarily is void, not because the

Secretary did not have authority to remove the restriction, but because the owner never made or consented to the conveyance.*

That is the view of the law upon which Judge KNOX proceeded in *Barnett* v. *Equitable Trust Co.*, 21 Fed. 2d, 325, 326, and it is necessitated, we think, by the fact that Congress has confided to the probate courts of Oklahoma jurisdiction over the estates of both minor and incompetent Indians. That jurisdiction of the courts is subject, of course, to the power of the Secretary to refrain from removing restrictions; but when the Secretary removes them, the jurisdiction of the court, through guardians appointed by it, at once attaches.

The view expressed in the opinion of the Circuit Court of Appeals in the case at bar (37 Fed. 2d, 860) is erroneous, we think, in that it places unwarranted limitations both upon the power of the Secretary and upon the power of the Indian who owns the fund and completely ignores the jurisdiction of the probate courts. Under the view there expressed, it would seem that no Indian, no matter what heights of intelligence and education he might achieve, could ever make a gift of a single dollar out of his restricted funds, even though the Secretary approve, or that the courts in each instance are to supervise the Secretary's determination as to what is for the *benefit* of

*For a long period of years the Secretary himself recognized that he had no authority to disburse the funds of minors and incompetents to anyone other than their guardian. His regulations so provided (record in *United States* v. *Equitable Trust Co.*, No. 21, pp. 4, 71, 72) and that was the practice. It was not until October 1922, when the $1,100,000 distribution here in question was under consideration, that the Secretary asserted a different authority by amending his regulations so as to provide that, "in such individual cases or classes of cases" as he might direct, the funds of minors and incompetents might "be paid direct to the Indians entitled thereto" or "otherwise paid out for their benefit and use as the Secretary of the Interior may authorize in said cases" (*idem*, p. 75). That amendatory regulation, we submit, is void because in excess of the Secretary's power, and the Government itself formerly so asserted (*idem*, p. 75, par. 13).

the Indian. The Circuit Court of Appeals failed to note the distinction between adult and competent Indians and minor and incompetent Indians; and while it reached the right result in this case, its process of reasoning is apt to do harm in other cases.

Application of the foregoing principles to the case at bar.

It is not our purpose to enter upon any discussion of the argument for the petitioner. We beg, however, to indicate very briefly how our views apply to the four questions stated at pp. 11, 12 of petitioner's brief as the "outstanding questions presented by the petition".

The first question there stated is whether the Secretary may unconditionally remove restrictions. The answer to that question is, we think, unquestionably "Yes".

The second question there stated is whether the Secretary "can lawfully approve the request of an adult full-blood member of the Creek tribe of Indians to make a gift *inter vivos* to his lawful wife of a portion of his restricted moneys in the hands of said Secretary" and whether the Secretary "may lawfully transfer to said wife said fund upon request of said Indian". The answer to that question is, we think, unquestionably "Yes", *provided* the Indian is mentally competent to make such a gift and understands what he is doing. If the Indian be mentally *incompetent*, the Secretary still can "lawfully approve the request" but such approval does not effectuate a valid gift because of the mental incompetency of the donor, and the Secretary may not lawfully transfer the fund to the wife because the incompetency of the Indian makes it unlawful for him to transfer it to anyone other than a duly appointed guardian.

The third question stated by the petitioner is whether the "discretionary judgment" of the Secretary in the disposal of the fund in accordance with the request of the Indian is subject to be reviewed and controlled by the courts where there is no charge of fraud or deception. The answer to that question is that the only "discretionary judgment" which the Secretary has is upon the question whether he will or will not remove restrictions, and if the Secretary decide to remove the restriction (no fraud practiced *by* or *upon* him appearing) his act in so doing is conclusive and cannot be revoked or set aside by a court. We can conceive of circumstances under which the Secretary might be compelled by a court to remove restrictions, for otherwise an Indian might starve while the Secretary held his money; but if the Secretary remove restrictions and turn the fund over to or upon the order of an adult and competent Indian, or to the guardian of a minor or incompetent Indian, no court could interfere. If, however, the Secretary turn over the funds of a minor or incompetent Indian to *anyone other than his guardian*, then, of course, the courts could order a return of the fund because such act of the Secretary amounts to nothing other than giving away something that did not belong to him.

The fourth question stated by the petitioner is whether the degree of mental competence or incompetence of an Indian making a request for a disposal of a portion of his restricted moneys to his wife as a gift "limits, restricts or modifies the authority and power of the Secretary". The answer to that question is that the mental incompetence of the Indian, of course, does not in any way limit or restrict or modify the power of the Secretary to remove the restriction upon alienation, but such mental in-

competence does make it necessary for the Secretary, in case he decide to remove the restriction, to hand the fund over to a guardian of the incompetent, rather than to the Indian himself or to the person to whom the incompetent Indian is supposed to have "requested" that it be transferred, because a "request" by a mental incompetent is void and ineffective and legally non-existent.

Respectfully submitted,

JOHN W. DAVIS
HUGH H. O'BEAR
CARROLL G. WALTER
RAYBURN L. FOSTER
ALMOND D. COCHRAN

November, 1930.

CPY6782

SUPREME COURT OF THE UNITED STATES.

No. 78.—October Term, 1930.

Marshall L. Mott, Petitioner, *vs.* The United States of America. } Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[June 1, 1931.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit brought by the United States on behalf of Jackson Barnett, a full-blood Creek Indian, to recover certain United States bonds, charged to have been wrongly diverted from a trust fund held for him, or their proceeds or value if they have been converted.

A second amended bill of complaint was tendered for filing, to which the defendant objected on the ground that it did not state a cause of action. The court, treating the objection as if it were a motion to dismiss the tendered complaint after filing, held that no cause of action was stated and dismissed the suit.[1] On appeal the Circuit Court of Appeals held that a cause of action was adequately stated and reversed the decree with directions to permit the complaint to be filed.[2] Certiorari was then granted by this Court.

The suit arises out of the same transactions that were the basis of the litigation described in *United States* v. *Equitable Trust Company*, just decided.

The case stated in the tendered complaint is as follows. Barnett received an allotment from the lands of the Creek tribe. His title was in fee simple, but by reason of his being a full-blood Creek was subject to restrictions against alienation and leasing, except with the approval of the Secretary of the Interior.[3] Besides being under that disability, he was and still is by reason of mental infirmity incapable of managing his own affairs, comprehending the nature or extent of his property or understanding any kind of business transaction. Because of his mental infirmity he was ad-

[1] 33 Fed. (2d) 340.

[2] 37 Fed. (2d) 860.

[3] Acts March 1, 1901, c. 676, 31 Stat. 861; June 30, 1902, c. 1323, 32 Stat. 500; May 27, 1908, c. 199, 35 Stat. 312. And see Act May 10, 1928, c. 517, 45 Stat. 495.

judged an incompetent and subjected to guardianship by the probate court of the county of his residence in Oklahoma.

Apart from the approval of the lease about to be mentioned the restrictions incident to his status as a full-blood Creek have never been removed or qualified.

In 1912 Barnett, with his guardian joining therein, executed a lease of his land for oil and gas purposes, the lease being approved by both the probate court and the Secretary of the Interior. The lease and the Secretary's regulations, which were made part of the lease, required that the royalties be paid to a local representative of the Secretary in trust for Barnett and disbursed only with the Secretary's sanction. In time the royalties yielded a large fund, which the Secretary invested for Barnett's benefit in United States bonds.

In February, 1923, the Secretary, at Barnett's request, distributed the larger part of the bonds in gifts. One gift was to Barnett's purported wife and included $550,000 of the bonds. His request that the gifts be made was in the form of a written instrument on which he placed a thumb mark signature—he being then incapable, by reason of his mental infirmity, of comprehending or understanding the nature, import or effect of the instrument. The Secretary approved the request by an endorsement on the instrument and then transferred the bonds to the designated donees.

The wife immediately delivered $150,000 of the bonds to one McGugin, and he thereupon passed $15,000 of them to the defendant, Marshall L. Mott. Both McGugin and Mott at the time had full knowledge that the wife received the bonds as a gift out of Barnett's trust fund, that that fund represented royalties from the oil and gas lease of his restricted land, and that by reason of mental infirmity he was without capacity to initiate or make a gift or disposal of the bonds.

Mott has refused and still refuses to return the bonds so received by him to the United States or to account for their proceeds or value.

The prayer of the complaint is that Mott be required to surrender into court the bonds, or their proceeds or value if they have been converted, to the end that they may be restored to the fund from which they were diverted and there held for Barnett's use and benefit.

We are of opinion that the facts thus shown are such as to entitle the United States to the equitable relief which it seeks. Its right to sue in behalf of an Indian ward for the purpose of asserting and enforcing his interest in property diverted from a trust fund while being administered by the Government's officers is obvious. Barnett is such a ward, for he is a full-blood Creek Indian who has not been relieved from the restrictions we have described. The approval by the Secretary of the Interior of the oil and gas lease did not terminate them. It made the lease effective, but otherwise left the restrictions in full force. Besides, it subjected the royalties to restrictions similar to those applying to the leased land from which the royalties would come. This was accomplished by a provision in the lease whereby, agreeably to the Secretary's regulations, the royalties were to be paid to a representative of the Secretary in trust for Barnett and disbursed only with the Secretary's sanction. The authority of the Secretary to withhold his approval includes the lesser authority to give his approval upon condition that the royalties be thus conserved and protected.[4]

But while the Secretary is authorized to prevent improvident alienation or leasing by restricted Creek allottees he is not authorized to alien or lease in their stead and right. This is plainly the effect of the statutory provisions which we quote in the margin.[5] If an allottee chooses to alien or lease, the Secretary, if not satisfied that the transaction will be of benefit to the Indian, can prevent it by not approving it. But, if the allottee chooses not to alien or lease, the Secretary cannot do so for him, even though it appears that the Indian would be benefited. And of course the Secretary cannot merely of his own volition make gifts or donations of the Indian's restricted land.

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[4]Sunderland *v.* United States, 266 U. S. 226, 235; Starr *v.* Campbell, 208 U. S. 527, 533; United States *v.* Thurston County, 143 Fed. 287, 291; National Bank of Commerce *v.* Anderson, 147 Fed. 87, 90.

[5]The Act of May 27, 1908, c. 199, 35 Stat. 312, provides:

"Sec. 1. . . . That . . . all allotted lands of enrolled full-bloods . . . shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance . . . except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. . . .

"Sec. 2. That all lands other than homesteads . . . from which restrictions have not been removed may be leased by the allottee if an adult,

Like principles apply to restricted funds such as that arising from Barnett's royalties. That fund was his individual property and as such was within the protective guaranties of the Constitution.[6] No statute purported to give any authority for taking it from him. Nor was there anything in the Secretary's regulations indicative of an assumption of such authority. On the contrary, they contemplated that such funds would be held, conserved and protected for the benefit of their Indian owners.

We need not inquire, as the Circuit Court of Appeals appears to have done, whether had Barnett been mentally competent the gifts named in his purported request could have been made from his trust fund. That is not this case. Barnett, according to the complaint, was mentally incompetent to a degree which made him wholly incapable of understanding, intending or making such a request. Therefore the instrument, although bearing his thumb mark, was not his act and could not bind him. With it eliminated, the gift in question stood as if made by the Secretary merely on his own volition. This was beyond his authority.

The suggestion that his approval supplied the necessary intent on the part of Barnett is but another way of saying that the Secretary could make the gift merely of his own volition. The further suggestion that he must be presumed to have found Barnett free from disability and that this determination cannot be questioned in the courts is without merit. If good as to a mental incompetent, it would be good as to an Indian under age or even an infant. The suggestion has been disapproved by the Circuit Court of Appeals for the Eighth Circuit.[7]

Decree affirmed.

Mr. Justice STONE did not participate in the consideration or decision of this case.

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or by guardian or curator under order of the proper probate court if a minor of incompetent, for a period not to exceed five years, without the privilege of renewal: Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

[6]Choate *v.* Trapp, 224 U. S. 665, 677. And see Lane *v.* Pueblo of Santa Rosa, 249 U. S. 110, 113.

[7]Jennings *v.* Wood, 192 Fed, 507.